LEGISLATIVE REVIEW PROJECT

SUPPLEMENTARY REPORTS TO THE DIRECTIONS REPORT

PART II - THE CONSUMER PROTECTION CODE: FOUNDATION LEGISLATION

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LEGISLATIVE REVIEW PROJECT

SUPPLEMENTARY REPORTS

The following are Supplementary Reports to the Directions Report, which has been submitted to the Ministry of Consumer and Commercial Relations by the Legislative Review Project.

These Supplementary Reports provide the details of the research, consultation and analysis that led to the Directions Report. They also include an extensive summary of the Review Projects proposals: proposals aimed at ensuring a fair marketplace that will benefit Ontario consumers and businesses alike.

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8. Introduction

THE CONSUMER PROTECTION CODE - "FOUNDATION" LEGISLATION

INTRODUCTION

It is proposed that the Ministry of Consumer and Commercial Relations place a priority on its commitment to consumer protection for the balance of the 20th century and beyond, through the enactment of a new and comprehensive Consumer Protection Code (i.e. foundation legislation).

The purpose of the Consumer Protection Code would be:

- to provide the public - consumers and businesses alike - with a single, comprehensive statute on consumer protection, so that they can easily find the relevant information dealing with their concerns;

- to codify into one overall statute the various regulatory mechanisms whereby the Ministry registers businesses and its participants, licenses certain business participants, sets educational standards, specifies trust fund requirements, provides for bonding or compensation funds, and carries out certain administrative enforcement measures, such as inspection, investigation, the direction to furnish information, the cease and desist order, the assurance of voluntary compliance, and the order to refrain from dealing with assets.

Codification of an overall consumer protection statute means that there will be introduced into the legislature a law which will become the authoritative, comprehensive and exclusive foundation upon which consumer protection legislation will be based.

The Concise Oxford Dictionary defines "code" as a "systematic collection of statutes, body of laws so arranged as to avoid inconsistency and overlapping; and a set of rules on any subject". In essence, a code collects and organizes all the elements together into a single enactment - e.g. the Civil Code and the Criminal Code.

In addition, it is a common view that the word "code" implies a body of principles conferring rights. In other words, it has a nobility of purpose associated with natural law, rather than being a mere expression of positive law. An excellent example is the Ontario Human Rights Code, which is preceded by an extensive preamble containing a heavy dose of natural law.

Therefore, it is recommended that the new Consumer Protection Code contain public policy statements in the form of purposes of the Code, philosophy and principles of consumer protection, and consumer rights and responsibilities.

PROPOSED DIRECTION

It is proposed that the Consumer Protection Code include a statement stating the purpose of the legislation. This would provide a context and direction not only for the Code itself and its related legislation, but also for any future consumer protection legislation.

Statements of a philosophical nature (i.e. describing the assumptions and aspirations upon which the legislation is based) should be set out in the preamble. These statements would not be substantive in form, but rather declarative, educational, and morally suasive.

In order to establish a clear direction for judicial interpretation, as well as for the general application and enforcement of the legislation, it is proposed that a statement of legislative intent be included in the Consumer Protection Code, incorporating the philosophy and principles for an honest and fair marketplace. As part of the substance of the law, they would become the key reference-point for answering any questions, when the provisions of the law or the circumstances in which they apply are in doubt.

The stated purpose of the Consumer Protection Code would be made even more specific by the inclusion of the statements of consumer rights and responsibilities, which are explained in greater detail in the next paper.

9. Consumer Bill of Rights and Responsibilities

CONSUMER BILL OF RIGHTS AND RESPONSIBILITIES

BACKGROUND

It is proposed that statements of consumer rights and responsibilities be included in the new Consumer Protection Code. These statements would not only be symbolic declarations, but also an educational tool and a guide to understanding the Code.

Based on the premise that legal structures, however well designed, are only as effective as they are understood by the people they are meant to protect or regulate, this simplified, clear declaration of rights and responsibilities in a fair marketplace would represent a consistent, integrated approach to law-making and the publication, promotion and acceptance of the law.

The setting out of consumer rights for Ontario residents would not be a precedent. One of the earliest efforts in this area was contained in President Kennedy's famous Consumer's Bill of Rights Message in 1962 in which he declared the following to be basic rights:

The right to safety;

The right to be informed;

The right to choose;

The right to be heard.

In addition, the incorporation of rights into Ontario legislation occurred as recently as May of 1987, when royal assent was given to the Nursing Homes Amendment Act, which enshrined in law the rights of Ontario nursing home residents.

In order to establish a systematic, easy approach to the presentation of the 17 consumer rights and 1 overall duty which have been defined from the research by the Legislative Review team, they are grouped into the following categories:

Safety and Quality Rights, which is the category of rights dealing with hidden characteristics or defects which the reasonable consumer would not know or be able to detect, and which should therefore be subject to a minimum standard;

Economic Rights, the set of rights involving the protection of the consumer's monetary investment in the goods or services which are at the heart of the consumer transaction;

Fair Dealings Rights, which is the category of rights concerning the bargaining process that leads to an agreement;

Information Rights, those rights dealing with the information which the consumer needs to have or to control in order to make informed choices and to protect his or her reputation in the marketplace;

Collective Rights, those rights which can be exercised by consumers individually or by consumer organizations, and which are available to them by virtue of belonging to the class known as consumers;

Remedial Rights, those rights which provide the means to enforce the other rights;

Duty, which is not a category of rights, but rather an obligation on everyone in the marketplace not to take unfair advantage by the strict enforcement of their rights without also taking into account their countervailing responsibilities.

PROPOSED DIRECTION:

The following 17 consumer rights and 1 overall duty in a fair marketplace are recommended for specific inclusion in the legislation:

SAFETY AND QUALITY RIGHTS

1) Right to Health and Safety

The consumer's right to physical health and safety in the normal or expected use or enjoyment of goods or services, and to be free from risks and dangers posed by defects or characteristics of the goods or services of which he or she was not made aware.

2) Right to Quality Commensurate with Price

The consumer's right to quality and durability of materials and workmanship in goods and services such as are reasonable and acceptable in relation to their price, description and stated or implied purpose.

ECONOMIC RIGHTS

3) Right to Protection of Economic Interests

The consumer's right to have his or her economic interests protected by the creation of a statutory consumer's lien on the goods for which, and to the extent of which, he or she has made some payment which the vendor is obliged to return, but has not yet returned to the consumer. The lien is to be effective against the vendor and all claimants through the vendor until the consumer is repaid in full.

FAIR DEALINGS RIGHTS

4) Right to Honesty

The consumer's right to honest practices and representations on the part of all persons who bring the goods or services which are the subject of the consumer transaction into the marketplace.

5) Right to Fairness

The consumer's right to fair and ethical treatment including fair terms of credit, and to understand fully and to accept freely his or her contractual obligations.

6) Right to Choose

The consumer's right to choose to accept or reject without penalty or further financial responsibility, goods or services which do not correspond to the sample, description or demonstration which formed the basis of the contract; and the consumer's right not to be legally liable for any unsolicited goods or services, including credit cards, which he or she has neither accepted nor requested.

INFORMATION RIGHTS

7) Right to be Fully Informed

The consumer's right to have, prior to entering into the contract for goods or services, such clear, accurate and effective information about the essential characteristics of the goods or services, including their currency of technology, their quality and durability, as is sufficient to assess the benefits and risks in acquiring or using those goods or services.

8) Right to Privacy and Confidentiality

The consumer's right to privacy and confidentiality of financial and personal information which is given by him or her in the course of a consumer transaction or application for credit, or which is collected on, or reported about, the consumer in anticipation of entering into a consumer transaction with or extending credit to the consumer.

9) Right to be Made Aware of Consumer Rights

The consumer's right and responsibility to be made aware of consumer rights and responsibilities in the marketplace.

COLLECTIVE RIGHTS

10) Right to Organize and be Represented

The consumer's right to organize and be represented for the better promotion, protection and enforcement of consumer rights.

11) Right to be Heard

The consumer's right to be heard both to express his or her dissatisfaction and to seek aid in resolving problems arising from consumer transactions, and to be consulted in the formulation of policy and in regulatory proceedings.

12) Right to Participate

The consumer's right to participate by having consumer representatives sit as equal partners with business and government representatives on policy-making bodies.

REMEDIAL RIGHTS

13) Right to Accessible and Prompt Justice

The consumer's right to accessible and prompt justice by the removal of procedural, technical and financial barriers to having his or her case adjudicated by the appropriate administrative tribunal or court and the consumer's general interest in having accessible and prompt justice acknowledged.

14) Right to Conciliation, Mediation, and Arbitration

The consumer's right to a system of third party intervention, whether by voluntary, binding conciliation or arbitration, or otherwise, if the parties agree not to commence or continue any other civil proceeding on the same subject matter. The decision of that mediation, conciliation or arbitration is to be enforceable as an order of the court.

15) Right of Cancellation

The consumer's right to cancel the contract and have the return of any payment where the vendor has breached the consumer's rights, has failed to deliver the goods, to perform the service or to respond to the consumer's complaint within a reasonable time, or, in the case of door-to-door sales, where the consumer has, during the cooling-off period, informed the vendor that the consumer has decided not to proceed with the contract. It is to be the vendor's responsibility to notify the consumer of the right of cancellation.

16) Right to Recourse and Redress

The consumer's right, exercised either by himself or herself or by a representative, to recourse and redress through the civil courts to protect the consumer's private interests and to provide civil remedy for the breach of the consumer's rights.

17) Right to the Enforcement of Consumer Protection Law

The consumer's right to the enforcement of consumer protection law by means of public or private prosecution, or by means of participation in the proceedings as a third party intervenor (where, in the latter case, the presiding judge considers it to be appropriate).

OVERALL RESPONSIBILITY

Duty to Act Reasonably and in Good Faith

Every one involved in a consumer transaction, either directly or indirectly, or deemed to be involved by virtue of the provisions of this Consumer Protection Code, is to act reasonably and in good faith in the circumstances of the transaction.

10. Consumer Awareness and Education

CONSUMER AWARENESS AND EDUCATION

BACKGROUND

Importance of public awareness and education in ensuring consumer protection

The Ontario government recognizes its responsibility to assist in the creation of a fair and effectively functioning marketplace, whereby both consumers and business stand in positions of relative equality. It is generally understood and appreciated that fair and effective consumer protection and business practices laws are required to achieve this equality.

As stated before, a fair marketplace is based on four fundamental principles - namely, reasonable information disclosure, transactional fairness, fair value and access to justice.

However, it is not universally understood or appreciated that the most innovative legislation will not work effectively or maintain any degree of equality in the marketplace if either consumers or business are unaware of the laws. Therefore, public awareness and education is just as important as the prevention, pursuit and resolution mechanisms contained in the laws.

Surveys of public awareness level

Past surveys of the Ontario public and research on consumer protection issues demonstrate a significant lack of knowledge with respect to consumer matters. Specifically, the public is quite uninformed about consumer protection legislation, how to learn about consumer rights, and the availability of mechanisms to solve complaints. Moreover, this lack of knowledge is markedly higher among vulnerable groups, such as the poor, the uneducated, the elderly, recent immigrants, the disabled, those living in isolated areas, and also the francophone community, especially innorthern Ontario.

Need for improvement of Ministry consumer awareness programs

The Consumer Protection Bureau Act enshrines in law the Ministry's responsibility to educate and inform Ontario consumers. Over the past number of years, there has been considerable effort by the Ministry to do just that. For instance, some innovative public awareness programs have been developed and implemented by the Communications Services Branch and the Business Practices Division. Nevertheless, these efforts have lacked the funding, personnel and coordinated planning necessary to significantly improve the level of public awareness regarding the Ministry's programs and legislation. In order to make a concerted effort to

improve this low level of awareness, existing Ministry programs in the area of consumer education must be re-designed, taking into account today's pressing need for an informed consumer public, particularly with respect to vulnerable groups.

Importance of Ministry's role in consumer education

Arthur D. Little of Canada Limited, a firm of management consultants, was commissioned to provide the review team with a projection of what the Ontario marketplace will be like by the year 2000. The importance of the Ministry's role in consumer education is stressed by the following quotes from the Executive Review report published by this firm:

> "At the "learn and adapt" stage, the Ministry has a powerful role in the dissemination of information, the interpretation of events and the education of the participants."
>
> "At the consumer level, the education function is paramount. It is contrary to all concepts of civil rights to forbid a consumer to consume, but he/she can be educated to consume in a discriminating fashion. It is arguable that a system that educates people to earn an income should also educate them to spend it "wisely."

In addition, the following quotes, from the Consumer Advisory Panel discussions around the province, emphasize the importance of a consumer education program by the Ministry:

> "It doesn't matter what the law says or doesn't say, if no one knows about it."
>
> "More money should be spent on education rather than spending money legislating."
>
> "The government should be taking out commercials on T.V. ...they could be used to point out common rip-offs, consumer rights and responsibilities."
>
> "If they are going to change the laws, they need to educate consumers, but they also need to inform and educate business about them too."

It is important to note that lack of awareness of consumer rights was one of the main issues raised in these panel discussions throughout the province. It was emphasized that, in addition to providing information to consumers at the level of each individual transaction, government also has a responsibility to provide overall education programs for consumers.

The Legislative Review team and senior officials of the Ministry held their first meeting with the Minister's Advisory Committee on June 2, 1987. Members of the committee

stated at that meeting, as well as at subsequent meetings, that education and awareness should be the Ministry's highest priority in working to ensure a fair marketplace for consumers and business.

In conclusion, it is also essential to note the importance priority placed by the Ontario government on increased fairness in the marketplace and, therefore, the need for better-educated consumers. The following quotes are from the Speech from the Throne, delivered April 28, 1987:

> "My government will protect Ontarians from unfair and arbitrary practices in the marketplace. In doing so, we will take steps to promote increased consumer awareness."
>
> "Further steps will be taken to improve public access to consumer information."

Brief from the CAC with respect to consumer education

The following extract from the brief by the Consumers' Association of Canada (Ontario) to the Legislative Review Project demonstrates that organization's concern with regard to consumer education:

> "Each CAC group which examined specific consumer issues identified consumer education as the number one priority.
>
> No matter how comprehensive the consumer protection legislation is, it will not bring about the ideal marketplace unless it is accompanied by a comprehensive education package designed for all participants in this marketplace.
>
> At our 1987 Annual General Meeting, the delegates passed a resolution which addresses consumer education given in a formal setting: "Be it resolved, That the Consumers' Association of Canada (Ontario) recommend that the Ontario Ministry of Education and Ministry of Colleges and Universities and the Ministry of Consumer and Commercial Relations appoint a joint task force including representation from the Consumers' Association of Canada (Ontario) to develop a programme to use the resources and expertise of these ministries to ensure that consumer education in the province of Ontario becomes an important part of elementary, secondary, post secondary and continuing education school curricula.
>
> We urge that this resolution be fully implemented as soon as possible.
>
> In our experience in handling consumer complaints, we have found that small businesses are not at all familiar with the various pieces of legislation under which they

are supposed to operate. Therefore, in order to achieve the preferred marketplace, additional education using conventional and innovative techniques, must be targeted to business and to the average consumer, as well as to the vulnerable consumer groups such as new Canadians, the functionally illiterate, etc.

Many suggestions were made by our local groups and we offer these suggestions for your consideration. Public service announcements on radio and cable television; cartoon-type messages appealing to youngsters, which could appear on television programs shown on Saturdays and Sundays; messages aimed at adult viewers to appear during daytime "soaps", are all excellent ways to reach many consumers.

We suggest that messages delivered by high profile individuals are most effective. In many instances, individuals will do this as a public service.

A series of pamphlets for the functionally illiterate should be developed by the Ministry of Consumer and Commercial Relations.

The Ministry needs to address the problems of ethnic groups whose consumer backgrounds and experiences differ greatly from those in Ontario. We recommend that specific packages be developed for each major ethnic group detailing how consumer practices in Ontario differ from consumer practices in their native land.

There is a great need for teaching material aimed at the elderly consumer. At the present time there is very little available to assist educators in preparing interesting workshops which could be presented at senior citizens' meetings, etc. The marketplace has changed so significantly and seniors generally are not as well equipped to deal with the changes, especially in the area of technology.

"Consumer Beat", published by the Ministry of Consumer and Commercial Relations, contains some very good consumer information. If this publication is going to continue to be circulated to cable companies, radio stations as well as newspapers, it should be adapted to the needs of the particular media. The information is not reaching the wide audience it deserves.

It has been suggested that the Ministry of Consumer and Commercial Relations approach the cable companies to air Ministry-produced shows which would be relevant to areas of Ontario outside of Toronto. CAC feels that this would be an excellent way for the Ministry's presence to be felt in smaller communities.

We suggest that the Consumer Services Bureaus maintain a

higher profile in the communities in which they are located. In our experience, consumers are not aware that there is an office in their area. If an office is maintained, it should be maintained at a level that will encourage greater use of the resources available."

SPECIFIC ISSUES

Lack of knowledge about consumer protection

The Consumer Protection Bureau Act established the bureau as a branch of the Ministry of Consumer and Commercial Relations. Its duties included the responsibility to: "disseminate information for the purpose of educating and advising consumers on consumer protection and lending and borrowing practices".

Although it can be argued that this legislative intention was never given full expression, the existence of this statute demonstrates the Ministry's commitment to its role in the process of creating an aware and educated consumer public.

The reason for this commitment is understandable. It is clear that, in order to have an effectively functioning marketplace, one needs informed consumers. An unfair, and therefore, ineffective marketplace is the result when the parties to a transaction are not dealing at equal strength due to the consumer's lack of awareness of his or her rights.

This widespread lack of consumer awareness exists in spite of years of government efforts to rectify the problem. Previous Ministry surveys show that consumers are concerned that this deficiency makes them unable to meet their needs in the marketplace. Moreover, the statistical data consistently demonstrates that the lack of consumer awareness is greatest among the vulnerable members of our society (i.e. the poor, the uneducated, recent immigrants, the elderly, the disabled, those living in isolated areas, and francophones).

Awareness of consumer protection legislation was one of the areas questioned in the survey undertaken as part of the Legislative Review Project. Similar to the previous Ministry survey in 1983, respondents were presented with an open-ended question asking them to list those consumer protection laws and programs of which they were aware. As in 1983, responses included some specific laws, some general concepts which are embodied in laws, and other responses such as the Better Business Bureau, which is not related to the Ministry.

Similar to the results of 1983, most respondents in 1987 were not aware of any specific laws to protect consumers. When asked whether they were aware of the existence of any laws or government programs that serve to protect consumers of Ontario, 43% indicated that they were aware of laws and government programs. However, when those respondents were

government programs. However, when those respondents were asked to specifically list those laws or programs, only 32% were able to make a correct identification. Approximately 83% of the sample could not identify any laws that protect them in the marketplace. Compared to 1983 when 69% of the sample were unaware of any laws, and 1980 and 1983 when 62% and 61% respectively were unaware, results indicate that public lack of knowledge regarding consumer protection legislation may have risen in recent years.

Effectiveness of consumer protection legislation

The existing consumer protection laws (i.e. the Consumer Protection Act, and the Business Practices Act) were passed with the objective of ensuring marketplace equality. However, the simple enactment of laws will not solve the consumer's problem of being an unequal player in the marketplace if the consumer is not aware of the statutes' existence or of how to implement the rights provided to him or her in the statutes. For example, the existing Consumer Protection Act gives a consumer a 48-hour cooling-off period in which to cancel an executory contract (one in which goods/services are not provided, or full payment is not made, at the time the parties enter into the contract). However, nothing in the act requires a business to inform the consumer of this right, and, in fact, most consumers are entirely unaware of this right.

As most Ontario consumers are unaware of the legislation that exists to protect them and the rights that these statutes give to them, one must question the actual effectiveness of the legislation. It is clear that the need for the existence of consumer protection measures must be matched by the consumer's right and responsibility to become aware. Moreover, this awareness must be comprehensive enough to provide the consumer with the knowledge needed to be an effective member of the marketplace.

Similarly, if business is to consider itself bound by existing legislation that serves to regulate the marketplace, it must perceive that the other party, the consumer, is aware of existing rights and is able to seek a satisfactory solution if they are breached.

Scope of consumer education programs

Although efforts to educate the public with respect to consumer matters are generally accepted as justifiable, the scope of what constitutes consumer education should not be too narrowly defined. In today's complex society, consumer education should also include helping people become more aware of the consumer's role in the marketplace. That means the traditional forms of consumer education used by the Ministry of Consumer and Commercial Relations in the past should be expanded to a more comprehensive approach (for instance, target outreach programs to vulnerable groups).

Recent literature in the field of consumer education emphasizes that this more comprehensive approach is fundamental to the basic goal of creating a balanced marketplace.

Delivery of consumer education programs

In examining the role that a comprehensive consumer awareness program would play in the future, the Ministry should decide whether it should take on this important education task, or whether the delivery of this service should be shared with other ministries, as well as with businesses and associations.

Need for a comprehensive consumer awareness and education plan

Finally, any programs in the area of consumer awareness must take into account the fact that neither consumer education nor consumer protection laws would separately be enough to achieve a truly effective marketplace. A combination of the two, as part of a comprehensive plan, is needed. Attempting one without the other would be a counterproductive use of time, energy and resources.

PROPOSED DIRECTION

Improve the effectiveness of existing Ministry consumer education programs

A centralized coordinating organizational unit in the Ministry should be created, and should be concerned solely with all consumer awareness matters (i.e. consumer education, information, outreach, resources, media links, all public affairs). This unit should have sufficient funding and staffing to make it effective. It should be given the mandate to develop a comprehensive consumer awareness program.

Programs for vulnerable groups should be emphasized. Various suggestions from the organizations representing vulnerable groups, contacted as part of the consultation process for the Legislative Review Project, should be put into action. An excellent example is the proposal from the United Senior Citizens of Ontario, that mailings be made to their membership with their assistance.

New educational techniques and technologies should be incorporated into the educational programs of the Consumer Information Centre, in French as well as in English. A software program could be developed, using videotext technology, to provide the public with menu-driven access to consumer information in airports, hotels, and shopping malls.

The Ministry should cooperate with other Ontario ministries and with the federal government on programs and cost-sharing. There should also be close coordination with the Ministry of Education, with school boards, and with the investigations unit of the Consumer Services Branch, in order to better publicize prosecutions of interest to all consumers.

Working relationships with existing and emerging grass-roots consumer advocacy groups should be improved.

In addition, educational materials should be produced for the business sector,to ensure that it is complying with consumer protection laws.

Support the initiation of a Consumer Rights Community Legal Aid Clinic

A community legal aid clinic, specializing in consumer matters, should be created, and it should be funded and administered by the Ontario Legal Aid Plan. It could combine legal work (actual court cases and summary advice) with education, and with informing and organizing the public on important consumer issues. It could employ one lawyer, one community legal worker and one media liaison and education officer. The clinic could concentrate on the many consumer issues and education programs that the existing clinics are currently unable to handle, due to their lack of resources and expertise.

The clinic's board of directors would be made up of members of the general public interested in consumer rights issues.

Such a clinic could be jointly funded by the Ministries of the Attorney General and Consumer and Commercial Relations, by way of a transfer payment, and would likely require a joint submission to Management Board in order to obtain the necessary funding.

Encourage the development of consumer awareness programs by consumer advocacy groups

Existing consumer advocacy groups provide consumer education services, but these are restricted by lack of resources. The Ministry could help by creating funding for these grass-roots organizations to carry out their consumer education programs.

The terms of reference for these grants could include factors such as how the francophone community is to be consulted, represented or served on consumer protection issues.

Create a Citizens' Advisory Council

The Ministry should create a Citizens' Advisory Council with a mandate to consider matters of concern to Ontario consumers, advise the Ministry with respect to these issues, and heighten public and media awareness of consumer issues in

general. Members of this council could be representatives of provincial organizations with an interest in consumer issues (i.e. advocacy groups, community clinics, information centres, immigrant groups, labour unions, etc.).

In fact, the Council could be created out of the Minister's Advisory Committee, which was initiated as part of the Legislative Review Project.

Use actual consumer protection legislation as a vehicle to heighten consumer awareness

The new consumer protection legislation can be structured and used in various ways to ensure that its effect is to raise consumer consciousness with regard to rights and responsibilities:

- Most consumer matters should be covered in one comprehensive piece of legislation that is known and easily recognizable to consumers - i.e. a Consumer Protection Code.

- A short but clearly-worded statement of consumer rights and responsibilities should be included in this statute;

- The statute should be drafted in clear, easy-to-understand language, and should include a good index and a table of contents;

- There should be a statutory obligation that various types of consumer contracts (for instance, in door-to-door sales) be in a standard form. These standard forms should be appended to the statute;

- These contracts should have standard clauses clearly informing the consumer of his or her rights and responsibilities under the law (for instance, the allowed rescission period). Clauses should be disclosed prominently at the bottom of the contract informing the consumer of whether and how the contract may be cancelled, including a tear-away rescission notice;

- No contract should be binding on a consumer unless he or she has a signed copy;

- If a warranty exists, the contract should contain all necessary information about it, particularly how to follow its terms for resolution of problems with the product;

- An obligation should be placed on business to inform the consumer in writing prior to exercising the legal rights of repossession or forfeiture based on a default;

- The consumer protection legislation should clearly

enumerate all potential remedies available to a consumer;

- The courts and the Ministry should be given the legal power to provide for publication of orders or convictions against businesses under the consumer protection legislation;

- An obligation should be placed on business to post those portions of the consumer protection legislation directly applicable to their operation.

Other miscellaneous initiatives

The following education initiatives should be undertaken by the Ministry of Consumer and Commercial Relations in order to strengthen the effect of the new consumer protection legislation:

a) Development of a consumer education program with the Ministry of Education

Virtually all of the research and direct surveys canvassing consumers' opinions indicate that most individuals strongly support the government's role in raising consumer awareness.

Uniformly strong support has been expressed for the teaching of consumer issues in the schools. The Consumers' Association of Canada has passed a resolution to this effect, and the Ministers' Advisory Committee has recommended that consumer education be taught at all levels in the school system.

Implementation of this initiative would require that the Ministry of Consumer and Commercial Relations work closely with the Ministry of Education and school boards in developing and carrying out a comprehensive program.

b) Expanded use of the media and new technology

Most consumers are satisfied with the role that the media plays in informing the public about consumer matters, and hope that it continues to carry out this role. Although there are limits to the consumer education that the media can perform, the Ministry should consider an expanded use of the media and new technology (e.g. T.V. Ontario, videotext technology) as part of its consumer education program.

It should also be noted that the use of television as a communications method is essential in order to reach the large number of Ontario people who are illiterate or vulnerable in other ways (e.g. shut-ins).

c) Posting of a statement of consumer rights and responsibilities

A statement of consumer rights and responsibilities has already been recommended for incorporation into the new foundation legislation.

If the statement is strong, and concise, it may be able to capture the imagination and attention of the public at large. It may become easily recognizable. The Ministry could consider posting it in all of its public offices. In fact, the statement could be provided to all government offices, schools and stores for posting.

d) Co-operation with the province of Quebec

The Quebec Consumer Protection Office has proposed that it work with the Ministry of Consumer and Commercial Relations to distribute the English-language consumer magazine "Protect Yourself" in Ontario. Such a cooperative effort would assist Quebec in increasing the magazine's subscriptions and in making the magazine economically viable, and would also give a higher level of credibility to Ontario in implementing its stated policy to embark on closer ties with Quebec on cooperative programs.

SUMMARY

In summary, the proposed direction for the Ministry in regard to consumer awareness and education is that:

- the new consumer protection legislation be awareness-oriented;
- the Ministry upgrade its consumer education and outreach program, focus this important function through one coordinating organizational unit, give it the staff and resources to operate effectively, and allow it the mandate to develop a comprehensive consumer awareness program, in both French and in English;
- the Ministry promote the establishment and development of grass-roots consumer advocacy organizations, and cooperate with them in the consumer awareness field.

11. The Services Sector

THE SERVICES SECTOR

BACKGROUND

Importance of Service Sector

Upon the creation of the Service Sector Study Team, headed by George Radwanski, Special Advisor to the Treasurer of Ontario, in October 1985, the government formally recognized the emergence of service industries as a major economic sector. The preliminary report of the team was published as a background paper to the budget of May 1986, and the final report was released in October 1986.

The following highlights from the research material cited in the study team's final report show the prominence of the service sector in the province's economy:

- The service sector now accounts for 73% of employment and 70% of Gross Domestic Product;

- The service sector has been growing steadily over the past 40 years in Canada and in many other industrialized countries;

- Between 1941 and 1981, employment in business service industries grew by more than 700%, and employment in consumer service industries grew by 179%.

The American business periodical Fortune has predicted that there will be continued growth in the service sector throughout the 1990s, particularly with respect to the following consumer services: child care; specialized health clinics, treatment centres and non-traditional health professionals; travel; and recreation, amusement, fitness and self-improvement services (article dated Feb 2/87).

A report prepared for the Legislative Review Project by Arthur D. Little of Canada Limited highlighted services in its analysis of future trends and consumer protection:

> "The move to a service economy is well documented, but the documentation probably understates the true impact of the shift to service. In an environment where products are rapidly copied, the differentiating strategy is usually to wrap the "hard" product around with various value-added, largely-service elements. The result is that the proportion of total cost in the market price which is devoted to service elements is steadily rising."

Therefore, in addition to straight growth in the service sector, economists and business analysts have noted that the lines between goods and service businesses in the marketplace are becoming less distinct.

Definition of "services" in consumer protection legislation

In Ontario's Business Practices Act, services are defined to include those services "provided in respect of goods or of real property, or provided for social, recreational, or self-improvement purposes, or that are in their nature instructional or educational". This definition is specific and limited, rather than generic.

Different approaches to defining a consumer service are taken by various jurisdictions. For example, British Columbia's legislation provides the following general definition for services:

> "Services that are the subject of a consumer transaction, either together with, or separate from, any kind of personal property."

Prepaid services

Some jurisdictions have implemented legislation regulating future, or "prepaid" services. The following is a summary of the coverage provided by Quebec and Ontario, as well as that recently proposed by Ontario:

a) Quebec

Division VI of the Quebec Consumer Protection Act regulates contracts of "services involving sequential performance." The provisions cover all service vendors, or businesses, except educational institutions, municipal corporations, members of professional groups governed by The Professional Code, and services for which no direct or indirect remuneration is paid. Other classes of businesses may be excluded by regulation.

The Quebec legislation sets out provisions for all contracts for self-improvement services. All such contracts must be in writing and disclose specified information such as the duration of the contract, dates on which the services will be performed, total cost and payment terms. In addition, a copy of the regulated standard cancellation form must be attached to the customer's copy of the contract.

Businesses are not allowed to collect any deposit or prepayment before beginning to perform the services under the contract, and payment must be made in a minimum of two installments, equally spaced throughout the term of the contract. The consumer has a right to cancel a contract at any time, and the merchant must return to the consumer, within ten days, any money paid over and above the value of the services actually performed, less a penalty of not more than $50.

In addition, operators of physical fitness studios are subject to provisions specific to their industry. Every

operator must be licensed, and the license number stated in every contract. Contracts are limited to one year in duration. The consumer has an additional right to cancel a contract within the first one-tenth of its duration and receive a refund equal to all money paid less one-tenth of the total value of the contract.

b) British Columbia

British Columbia's Consumer Protection Act also regulates future service transactions, by providing for a cooling-off period, additional rights of cancellation, limits on the cost and duration of contracts and trust fund requirements.

c) Ontario

Legislation to regulate certain types of prepaid services is presently before the Ontario Legislature. The Prepaid Services Act, which passed first reading in May 1987, and which was re-introduced during the fall session of the House, would regulate health, fitness, modelling, diet, talent, martial arts, sports and dance clubs or studios where services are prepaid. The essential provisions of the bill are as follows:

- The act only applies where there is payment in advance for instruction and/or use of facilities;
- Contracts must be in writing, and must comply with disclosure requirements set out in the act;
- Contract terms are limited to one year, and any concurrent or overlapping contracts must relate to distinctly different services;
- Initiation fees are restricted in both number and amount;
- A cooling-off period is established, and consumers have additional rights to rescind contracts if certain conditions are not met;
- Customers must be notified in writing before an automatic renewal clause is evoked;
- While facilities are being built,or otherwise not available for use, customers' prepayments must be held by a trustee.

Legislation respecting prepaid funeral services received first reading in the Ontario legislature in June, 1987 and was re-introduced during the fall session. The new bill provides for a compensation fund with respect to prepaid funeral services; regulates prepaid funeral service contracts to require written disclosure of certain information and to guarantee certain cancellation rights for consumers; and requires and regulates the use of trust accounts for prepayments on contracts for funeral services.

Vulnerable consumers and the services market

The aging population can be expected to generate growth in the consumer services market. Changing family structures have also created demand specifically for housekeeping, child care and similar personal services. The increased involvement of disabled and elderly people in society and the economy also affects the market and affects demands on government for consumer protection measures.

In a brief to the Legislative Review Project in June 1987, the government's Office Responsible for Disabled Persons stated that:

> "in recent years an increasing number of disabled adults are electing to live independently in the general community instead of in institutions".

A brief from the Canadian Paraplegic Association also noted this trend and examined the implications for consumer protection in the services market:

> "...there are some other private individuals who are able to afford their own assistance in their own homes but really have no legislated set of standards to refer to with respect to reasonable assurances of quality and expertise. Many of the disabled individuals we speak of do not require so-called professional services such as nursing, occupational therapy, etc., but rather physical assistance with managing a normal daily routine. Therefore, while we feel that this kind of service bears examination with a mind to setting some kind of consumer protection standards, we would not want to see legislation which imposes over-professionalization of these kinds of services with attendant higher costs."

In the United States, services to non-institutionalized seniors and disabled people are provided primarily by commercial businesses in the marketplace. In the United Kingdom, however, the government is the primary provider of services to the elderly, and certain levels of service are virtually guaranteed to individuals as they reach certain ages.

SPECIFIC ISSUES

The consumer services marketplace is continually expanding and changing; new services and variations on existing services appear quickly and old ones lose popularity or become obsolete. It is reasonable to assume that in most of their service transactions, businesses operate fairly, the quality of service meets the reasonable expectations of consumers, and both parties are satisfied.

At the same time, certain service sector businesses bear close scrutiny by the Ministry, consumer groups and ethical operators. This may be because actual unfair practices are happening (eg. home improvements), because the consumers are particularly vulnerable and a potential for unfair practices is apparent (eg. financial planners), or because the marketing practices or financial underpinnings of the businesses place consumers at risk of financial loss (eg. fitness clubs).

The following review of service sector businesses is derived from a scan of the consumer protection environment in Ontario. The scan covered the media, Ministry public education publications, complaints to the Ministry (including letters to the Minister), and submissions by industry associations and consumer protection groups. It is recommended that the Ministry initiate an ongoing review of these businesses to regularly assess the need for any intervention through increased public education, cooperative efforts with associations or possible action.

Cheque Cashing Services

In June 1986, the Provincial Coalition for the Cashing of Cheques, a lobby group composed primarily of community legal clinics, presented a brief to the government entitled "Cashing of Social Assistance Cheques". It recommended that legislation be passed to prohibit the charging of fees for cashing government cheques and money orders.

According to research presented in the brief, Ontario's half-million social assistance recipients often have less access to banks, and are forced to deal with third parties, thus incurring costs ranging from six to 30 percent of the value of the cheque. Since social assistance cheques are issued a few days in advance of the date on the cheques, cheque-cashing services which will cash post-dated cheques have an additional appeal for the poor, for whom cash-flow is a constant problem.

Cheque cashing is regulated in Quebec under Section 251 of the Consumer Protection Act, which prohibits any person or business from charging any fee for cashing federal, provincial or municipal government cheques.

Tax Rebate Discounting

Tax rebate discounting, a business in which income tax rebates or other government payments are purchased from consumers for a fee (usually based on a percentage of the rebate), represents another financial service said to be used primarily by the poor. The coalition brief states that, in 1984, 170,000 Ontarians used tax discounting services. It cites low income and the resulting cash-flow constraints as the primary reasons for consumers selling their tax rebates at a discounted rate instead of waiting several months to pocket the entire return.

There is legislation in Canada, both federally and provincially, pertaining to tax discounting services. The legislation treats tax discounting as a form of loan made to a consumer on the basis of an expected refund of income tax or other government payment. In 1978, the federal government passed the Tax Rebate Discounting Act, which limits the charges imposed in these transactions to 15 percent of the value of the tax rebate. It also requires refunds in cases where the actual rebate is more than anticipated, and sets out information which must be disclosed in tax discounting contracts.

Ontario repealed its Income Tax Discounters Act when the federal legislation was implemented. In 1985, the Ontario legislature passed a resolution against the "usurious" practice of tax discounting, and called for pressure to be put on the federal government to outlaw the practice entirely. Alberta, British Columbia, Manitoba, Nova Scotia and Saskatchewan regulate tax discounters. The substance of their acts ranges from straight information disclosure requirements to virtual duplication of the federal act, but confined to provincial income tax rebates.

Employment Agencies

The Ministry of Consumer and Commercial Relations has, in the past, received complaints from consumers about employment agencies, particularly regarding billing practices and unacceptable quality of service to consumers. Such complaint activity, in fact, prompted industry-specific legislative action.

Employment agencies are now subject to Regulation 280 under the Ontario Employment Standards Act. It classifies agencies on the basis of the types of jobs for which they recruit, requires licensing and bonds, and limits the fees which can be charged to consumer clients. After this regulation was implemented, the Ministry published public education material on the issue.

Opticians and Other Assistive Device Vendors

The Ministry hears occasional complaints from consumers regarding the services and the products sold by opticians, hearing aid sellers and similar professionals. These transactions include both service (i.e. filling prescriptions, fitting) and goods (i.e. the device itself), and consumers may experience dissatisfaction with both aspects of the purchase.

In Ontario, opticians are a self-regulating profession under the Ophthalmic Dispensers Act, which establishes the Board of Ophthalmic Dispensers, charged with responsibility for administering and enforcing the act, sets out registration requirements, prohibits unauthorized practice, and provides for revocation of registration in cases of fraud,

misrepresentation, incompetency or unprofessional conduct.

Complaints to the Ministry about these services raise the question of whether such boards have, or should have, consumer representation.

Apartment Finders

Some consumers have complained to the Ministry about dissatisfaction with the services of apartment-finding service agencies. Frequently, the complaint relates to claims by agencies that their listings are exclusive, when in fact they are drawn only from newspaper classified advertisements.

In Ontario, apartment finders are subject to the Business Practices Act and to contract law. Although consumers pay upfront for these services, they are not covered in the proposed legislation on prepaid services.

Education and Self-Improvement Services

Consumers' problems with private education and self-improvement businesses may be addressed through the Ministry of Colleges and Universities, which is responsible for licensing private schools, or through this Ministry, under the Business Practices Act or the proposed Consumer Protection Code. Private adult education has been a growing industry, and there is social, economic and demographic evidence to expect it to continue to expand. The Ministry of Colleges and Universities is presently examining problems with refunds and consumer losses in continuing education.

Financial Planners

In a brief to the Legislative Review Project, dated June 1987, the Consumers' Association of Canada (Ontario) cited the growing business of financial planning as an area in which consumers are vulnerable to losses. At their annual general meeting in 1987, CAC passed the following resolution:

> "Be it resolved, That the Consumers' Association of Canada (Ontario) express concern to the Ministry of Consumer and Commercial Relations and the Ministry of Financial Institutions that the rapid uncontrolled growth of the financial planning sector exposes unwary and vulnerable consumers, in some cases, to fraud, and misleading or incompetent counselling from some who claim to be qualified financial planners, and
>
> That the Consumers' Association of Canada (Ontario) urge the Ministry of Consumer and Commercial Relations and the Ministry of Financial Institutions to work together to develop stringent standards for minimum education and other related qualifications for financial planners, and a requirement for disclosure of any potential conflict of interest or affiliation with a company whose product is

being promoted, and

That the Consumers' Association of Canada (Ontario) urge the Ministry of Consumer and Commercial Relations and the Ministry of Financial Institutions to enact legislation to ensure consumer protection in the field of personal financial planning."

Another brief that covered the same concerns came from The Credit Counselling Service of Metropolitan Toronto, dated August, 1987. It stated:

> "There are numerous individuals and firms in the province offering advice on various types of financial planning. They range from well-established and highly ethical accountants, estate planners, investment counsellors, etc., on the one hand, to self-styled financial advisers on the other hand. We believe that the latter group need to be prohibited. The challenge for the Legislative Review Project will be to arrive at a definition which will segregate the two groups without either being too restrictive and driving the legitimate planners out of business, or being so loose as to be ineffective."

Financial planners themselves have approached the Ministry requesting legislation establishing their association as a self-regulating profession.

The financial planning industry is currently under study by a task force within the Ministry of Financial Institutions. It is expected that a report will be ready in the near future.

Paralegal Agents

Paralegals fall into two distinct groups: support personnel on the staff of law firms operating under the supervision and control of a solicitor; and students and law clerks who take on various types of legal work but who are not supervised (or, who are only marginally supervised) by competent lawyers. In recent years, paralegal agents have been the subject of debate publicly and within the legal community.

In its brief to the Legislative Review Project dated August, 1987, the Credit Counselling Service of Metropolitan Toronto submitted that the "For Profit" Paralegal firms engaged in debt counselling, pro-rating, and credit clinics are providing unnecessary services at great cost to Ontario consumers. The association believes that most, if not all, of the services provided can be obtained at no cost to the consumer, and that those individuals who sign up tend to be those who can least afford the excessive fees being charged.

Moving Companies

The Ministry receives occasional complaints regarding the quality of service (items damaged, etc.) by moving companies. Consumer education materials have been issued, recommending that consumers pay attention to contract terms and comparison shop. In Ontario, moving companies are subject only to the Business Practices Act. The provisions for implied warranties on consumer services, recommended for Ontario's Consumer Protection Code by the Legislative Review Project, could have a positive effect on consumer redress in this business (refer to the section on warranties in the chapter entitled "Standards and Expectations of a Fair Marketplace").

Computer Service Counsellors

The Consumers' Association of Canada (Ontario), in its brief dated June 1987, expressed concern with respect to computer service counsellors. Questions were asked as to whether a consumer has any recourse if he or she follows advice to purchase customized software which proves incapable of doing what the consumer was led to expect, as well as whether these counsellors must meet any standards now.

Credit Clinics

The Legislative Policy Committee of the Associated Credit Bureaus of Ontario made a submission in August of 1987 to the review project, requesting that preventive measures with respect to credit clinics be incorporated into the new consumer protection legislation.

In the United States, more than 500 credit repair companies, or "credit clinics" have sprung up; organizations that offer to obtain credit or improve the credit standing of consumers in return for fees ranging from $75 to several hundred dollars. This development has harmed many consumers, particularly those who are poor or are unsophisticated in credit matters. That is because credit clinics sell information that, under federal law, is already available to the consumer from traditional consumer reporting agencies, and at nominal or no cost. A number of states now have legislation regulating the industry by providing prospective credit clinic customers with the information they need in order to assess whether the services would be useful, by protecting the public from unfair or deceptive advertising, and by prohibiting certain practices by credit clinics.

Although no credit clinics have been successfully established in Ontario, there have been some attempts to create businesses in this area through newspaper advertisements for prospective clients. It is proposed by the Associated Credit Bureaus of Ontario that government give a strong message to those who would bring this concept into Ontario, that the practices of credit clinics are not acceptable in our province.

In addition, the Credit Counselling Service of Metropolitan Toronto made the following proposal regarding credit clinics to the review team in August, 1987:

> "Credit clinics, which are common in the United States, arrange (for a fee) to erase any derogatory information contained in a consumer reporting file. Under the terms of the Credit Reporting Act, consumers are free to examine their files at credit bureau offices and to request that any erroneous information be verified and if appropriate, corrected. The credit clinics (based on United States experience), seek to bombard the credit bureaus with so many requests for verification and correction that they cannot cope with the volume and so "correct" consumers' files even when it is not warranted.
>
> This trend, if it is allowed to be developed, will destroy the integrity of the credit reporting system with the following results:
>
> 1) Credit granters will be unable to distinguish between good and poor risk customers and will tend to charge higher borrowing rates for all. Increased bad debt expenses will be passed on to all consumers;
>
> 2) Legitimate, but less self-disciplined CCS clients will be able to obtain further credit to the detriment of their ongoing CCS rehabilitation programs;
>
> 3) Bonafide consumers, aware of legitimate credit report errors, will be unable to obtain the attention of the credit bureau to correct them due to the competing volume from credit clinics;
>
> 4) Consumers with significant money problems will have those problems exacerbated to the extent that clinics charge fees ranging from $75 to several hundred dollars for services that can be had free of charge by direct application by the consumer to the Credit Reporting Agency;
>
> 5) Any "repairs" made to a consumer's credit file should be done by credit bureau personnel in direct contact with the consumer. In these cases the reporting agency will not only correct the individual's file, if that is appropriate, but will also advise recent inquirers of the change. This procedure is prescribed by legislation. Credit reporting files are computer updated monthly by most of the larger credit issuers so that an unsubstantiated "correction" may revert to its previous condition. In this case, the consumer will have "bought" only one month's relief, whereas a proper consumer interview with credit bureau personnel would result in permanent repair if this was found to be appropriate."

Additionally, it is understood that some U.S. credit clinics offer to "guarantee" to obtain particular bank, or department store credit cards. Clearly, this is a spurious guarantee because only the credit granter can give this type of undertaking.

Based on the potential for wide-ranging misuse, possibly leading to fundamental damage to the integrity of the credit reporting system and the consequent harm to the consumer credit industry, leading, in turn to higher borrowing costs, we recommend that:

> "...it may be appropriate to make it an offence for someone who is not a solicitor to charge a fee for seeking to have verifications and corrections made to clients' credit reports. We further recommend that it be made an offence for anyone to represent that he can guarantee to cause another party to approve a credit application."

PROPOSED DIRECTION

- The original orientation towards goods in Ontario's consumer protection legislation should be revised in the formulation of policy and in the drafting of the provisions of the proposed Consumer Protection Code, through recognition of both the growth of the consumer service sector and the increasingly blurred boundaries between goods and services. The new Consumer Protection Code should apply equally to goods and services. For the purposes of the new code, services should be defined as all services, including those rendered in association with personal or real property. Provision can be made for excluding professional services provided by a member of a self-regulating profession under the authority of federal or provincial legislation;

- The recommendation for inclusion of implied warranties on services should be considered, as outlined in the section of this report related to warranties in the chapter called "Standards and Expectations of a Fair Marketplace";

- Consideration should be given to including general prepaid goods and services protection in the Consumer Protection Code, in addition to or in place of the proposed Prepaid Services Act;

- The Ministry should work with consumer, industry and trade associations to encourage information and price disclosure, complaints handling and other fair market practices, and jointly develop education programs about consumer service vendors;

- The following recommendations should be considered with respect to specific businesses in the service sector that appear to require the Ministry's attention:

a) Cheque Cashing Services

Throughout Ontario, there is an excellent network of Province of Ontario Savings Offices under the jurisdiction of the Ministry of Revenue. These could be used for the automatic deposit of provincial social assistance cheques. It is recommended that the Ministry of Consumer and Commercial Relations proactively consult with the Ministry of Community and Social Services and the Ministry of Revenue, in order to outline the benefits of such a move, which would eliminate the need for legislation prohibiting the charging of fees for the cashing of government cheques.

b) Tax Rebate Discounting

It is recommended that the Ministry of Consumer and Commercial Relations actively petition the federal government to make the practice of tax rebate discounting illegal.

c) Employment Agencies

It is recommended that the Ministry of Consumer and Commercial Relations analyze the extent of complaints in this area; if the level is significant, the Ministry should update, publish and distribute educational material in this area.

d) Opticians and Other Assistive Device Vendors

Complaints to the Ministry about these services raise the question of whether structures such as the Board of Ophthalmic Dispensers have, or should have, consumer representation. The Ministry of Consumer and Commercial Relations might encourage other ministries to review the self-governing businesses under their jurisdictions to determine whether consumer interests are considered in the decision-making process.

e) Apartments

It is recommended that the Ministry of Consumer and Commercial Relations consult with the Ministry of Housing in order to come up with the most effective solutions to complaints in this area.

f) Education and Self-Improvement Services

It is recommended that the Ministry of Consumer and Commercial Relations consult with the Ministry of Colleges and Universities in order to reach a consensus on the most effective ways of solving problems in this area.

g) Financial Planners

Once the Ministry of Financial Institutions completes its report on the financial planning industry, the Ministry of Consumer and Commercial Relations should request that an inter-ministry committee be set up to deal with unfair

practices by financial planners who are not affiliated with a particular financial institution.

h) Paralegal Agents

The Ministry of Consumer and Commercial Relations should consult with the Ministry of the Attorney General with respect to the regulation of paralegal agents not acting under the supervision of lawyers.

i) Moving Companies

It is recommended that the Ministry monitor the level of complaints regarding moving companies, and determine whether the introduction of implied warranties on consumer services provides an effective remedy in this area.

j) Computer Service Counsellors

The proposal to introduce warranty legislation, particularly as it would apply to services, should provide appropriate consumer redress in this area. It is therefore proposed that the Ministry monitor complaints regarding computer services to determine the new legislation's impact.

k) Credit Clinics

It is recommended that the proposal to prohibit credit clinics be given serious consideration when designing legislation in the overall credit area.

Finally, it is recommended that the Ministry closely monitor the effectiveness of the new Consumer Protection Code, in dealing with consumer services, including the new and expanding services of the future.

12. The Development of a Model of Assessment and Intervention

THE DEVELOPMENT OF A MODEL OF ASSESSMENT AND INTERVENTION

BACKGROUND

Intervention as an action or set of actions is very difficult to define in a way that will capture all of its critical aspects. Indeed, from the broader perspective, every involvement of the Ministry of Consumer and Commercial Relations into the marketplace, either directly or through a mandated other party, can be viewed as a form of intervention. This would include the on-going establishment of directions and fair marketplace systems, regulating occupations/ industries, inspecting, investigating, mediating, etc. The "interventionist" may vary from the minister, deputy minister, "director" and registrars, to consumer service bureau officers and investigators. The broadest form of intervention results from the policy development and legislation-making process. This process may eventually draw other occupations and industries into the Ministry's regulatory system, enhance or clarify powers of other interventionists and, in general, create or change the rules by which consumers and commerce interact.

In this complex environment of multi-layered interventionists, with different forms of intervention imposed upon a number of occupations and industries, the critical issue of intervention consistency must be raised. In theory, certain criteria should dictate the manner, nature and extent of the Ministry's involvement in the marketplace. Such direction should encourage the Ministry to behave in a certain manner despite what always appears to be unique situations and circumstances. The key questions thus become... who intervenes? ...in what manner? and when? Direction is essential to ensure the Ministry's orderly and consistent involvement in Ontario's marketplaces. It is this issue of consistency that this paper will discuss further.

GENERAL DIRECTION

Over the past year, two significant efforts on the part of the Ministry - The Legislative Review Project and the Ministry's Strategic Planning Process - have provided initial direction for the development of a philosophy for assessment and intervention.

The Strategic Planning process necessitated focussing upon the diversity of the Ministry's activities in order to create one common perspective of the ministry's role. As a statement of purpose, the Ministry of Consumer and Commercial Relations is to:

> "inform, serve and protect the public, participants,

consumers and businesses and to encourage the maintenance of an honest and equitable marketplace".

As a general statement of values, the Ministry:

> "recognizes that both consumers and commerce have responsibilities in the marketplace. When a choice must be made between the interests of companies and consumers, the Ministry will support the consumer".

One principle stemming from the statement of values is that the Ministry:

> "will match the strength of its intervention to the severity of the problem".

This principle reflects the key concept of proportionality, and one that must form the basis for any intervention philosophy. The concept of proportionality was also strongly supported by the Legislative Review Project's expert panel in its discussions of a philosophical framework for the legislation under review.

Another key element of an intervention philosophy should be the focus upon a fair marketplace, where transactions are concluded to the benefit of both consumer and commerce. The challenge to consumers, businesses and government is to explicitly create, maintain and, as an on-going priority, enhance marketplace fairness. The third element is flexibility. In a rapidly changing marketplace, the Ministry must ensure the on-going introduction of designs and structure to accommodate the realities of change. This places a considerable onus on the Ministry to remain flexible as to when and how to involve itself.

ON-GOING INTERVENTIONS

As indicated earlier, every involvement of MCCR in the marketplace can be viewed as intervention. For present purposes, it is necessary to distinguish intervention in terms of the Ministry's present involvement in the marketplace from the manner in which new interventions are contemplated.

The basic approach of the Ministry is to register industry players. Registration includes the use of certain criteria which ensures that industry players have achieved some minimal expectations before they enter the fair marketplace arena. Industries presently registered include:

- real estate agents, brokers and business brokers;
- new and used automobile sellers;
- travel agents and wholesalers;
- private bailiffs; and
- door-to-door sellers.

With registration comes additional legislative direction, as

well as authority for the Ministry to inspect industry practices, enforce regulations and, if necessary, revoke registrations, freeze assets, and so on. (The attached Appendix provides an overview of those registered, and the Ministry's involvement.)

Another form of intervention involves registration or licensing of a particular activity. Thus, new home builders are registered for a number of houses or units; boxers and wrestlers are licensed for one event, as are bingo operators. Again, with registration or licensing comes additional direction, as well as certain authorities for the Ministry.

A third type of current legislative intervention, which is less intrusive, in that registration or licensing of industry participants is not required; instead, the Ministry attempts to define and set expectations for marketplace behaviour. For instance, the Condominium Act sets expectations for the development, selling and management of Condominiums. A second example is the Discriminatory Practices Act which prohibits discrimination between two businesses. Ministry involvement in these situations is minimal.

The fourth type of legislation differs from the other three in that its expectations are more generic and transaction-focused.

Specific examples are the Business Practices Act and, in part, the Consumer Protection Act. In the case of the former, no industry is specifically mentioned (although a number are excluded). General expectations are set to define the nature of a consumer transaction; as a result, there is potential for a great deal of flexibility as to the nature and extent of Ministry involvement and intervention. Where the Business Practices Act attempts to set expectations as to the information disclosed and a certain level of fair trade practices, the Consumer Protection Act attempts to create some minimal standards for transactional fairness, based on factors such as the place in which the parties enter into the contract (i.e. the home).

Both acts give certain rights to the consumer such as cancellation and authority to the Ministry to stop dubious practices and punish those in contravention of the law.

The final type of intervention by the Ministry is in the form of a number of bureaus it has established around the province to provide information to consumers, explain their rights under current legislation, and, where possible, mediate disputes.

To complete the discussion, mention should be made of a new mode of intervention that is under experimentation but not yet legislated. The classic example is the Ontario Motor Vehicle Arbitration Program, which was negotiated by the Ministry and the industry. Similarly, the addendum to all new home

purchase of sale contracts was a negotiated resolution to a certain problem, although the use of the addendum became a registration requirement under the New Home Warranty Plan Act.

An extension of this approach is self-regulation by an industry. Although no industry currently under the Ministry is self-regulating, a number of regulated industries (real estate agents and brokers, travel agents and wholesalers) have expressed an interest in this approach. This would be a significant extension of what a number of associations are presently doing in mediating disputes, providing education and, in general, setting expectations for the behaviour of their members. Indeed, on a number of occasions, the Ministry has asked an industry to deal with a certain situation as an alternative to direct Ministry involvement.

The above brief discussion has attempted to provide some insight into the nature and level of intervention presently being carried out or possibly contemplated by MCCR. These can be ordered, from least to most intrusive, as follows:

1) self-regulation;
2) industry solves problem without Ministry involvement;
3) industry and Ministry negotiate solution(s);
4) Ministry sets declaratory expectations;
5) Ministry sets "transaction-oriented" legislation;
6) Ministry enhances regulatory legislation.

The fifth intervention was placed in the order list to demonstrate its approximate level of intrusion. However, it must be recognized as a qualitatively different approach to intervention and one that provides considerable flexibility in Ministry intervention into non-regulated industries.

The existing regulatory framework, as just described, was examined by the Legislative Review team. Consultations with industries, and Ministry personnel, as well as other research was carried out, and attempted to capture both the current and future regulatory requirements. The resulting direction is proposed either generically (foundation legislation) or on an industry-specific basis.

NEW INTERVENTIONS

In order to ensure consistency in the Ministry's future intervention practices, and, bearing in mind the need for proportionality and flexibility, three questions require some deliberation:

1) When should intervention take place?
2) What form should the intervention take?
3) Who should intervene?

Definite answers are not possible, given the complexity of the marketplace, the participants - both business and consumers -

and the rapid changes that are occurring. However, some direction can be given, as follows:

1) When and whether to intervene

Intervention may be initiated for a number of reasons. If one excludes the more obvious interventions needed to stop blatant scams, prosecute criminals, etc. and focuses on the normal consumer-business transaction, the Ministry intervention can be viewed as an activity or set of activities leading to the minimizing of consumer risk and/or its redistribution from the consumer to the seller/business.

In every transaction, there is an element of uncertainty as to the successful outcome; therefore, risk. Risk exists for a number of reasons, both general and specific to the transaction. In general, the seller has greater control of the transaction process, so usually the consumer bears more of the transaction risk.

Intervention into the marketplace for the purposes of re-distributing the risk, results in two phenomena:

- increased conformity of the product or service and/or industry and its players;
- corresponding increase in the cost of the product or service.

From these two changes in the marketplace, questions arise which can form the criteria for possible intervention:

- Is the new level of protection justified given the increased cost?
- Will the increased conformity of the product/service significantly offset the consumer's freedom to make decisions concerning price and risk?
- What impacts will the industry feel in terms of increased administration, conformity of products/services, costs, etc.?
- What is the cost to society in terms of job creation, job retention, innovations, new industry growth?
- Will the intervention directly or indirectly create other problems?
- Will the intervention be consistent with other government initiatives and/or overall government direction?
- Has the cost of intervention been considered?
- Is the proposed legislation enforceable?

Such questions may be taken as relative given other environmental factors which may determine the appropriateness of any intervention. For instance, the state of the economy (high unemployment, high interest rates, etc.) may mean it is not an appropriate time for highly intrusive intervention. More dramatic changes resulting from current and broader policy direction (e.g. free trade) could create an additional set of intervention criteria.

2) Level of intervention

There appear to be two general routes to take in considering intervention into the marketplace:

One involves gradual, increased involvement only after other means to deal with the situation appeared to have failed. For example, legislation is proposed only after the industry has tried unsuccessfully to resolve the issue, then the government has established some guidelines, but that step has also failed.

A second option is to consider legislation as the first step. In this situation, the issue would be seen as generalized, significant and long-term, reflecting one or more of the following factors:

- o significant consumer dollars involved;
- o health or emotional implications;
- o significant impact on lifestyle;
- o significant degree of risk for the consumer;
- o nature of the business (low entry barriers, rapid shifts in players);
- o intent of business (e.g. conscious misrepresentation, high pressure tactics, some victimization);
- o nature of consumer population involved and its vulnerabilities;
- o high level of consumer complaints;
- o high level of consumer dissatisfaction.

Some additional reference must be made to the vulnerable consumer. There are two types of vulnerability exhibited in the marketplace, and recognized by current legislation.

The Business Practices Act acknowledges the fact that not all consumers are equal when entering into a transaction. Some are more susceptible than others. The act states that one type of unconscionable transaction occurs when:

> "...the consumer is not reasonably able to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors."

The second type of consumer vulnerability results from the context, environment or circumstances of the transaction. The

Consumer Protection Act registers door-to-door sellers, and sets expectations regarding the transaction, and allows a cooling-off period, in the belief that the consumer is more vulnerable in these transactions. Also, one industry has argued that allowing cemetery owners to sell monuments or markers at the same time plots are sold creates a "captive" and vulnerable consumer.

As well, certain services and products tend to be oriented more toward certain groups who may prove vulnerable in one or both ways. Elderly, for example, rely increasingly upon mail orders, telephone solicitations, door-to-door sellers, and home renovators. Certain industry areas such as travel and deathcare are also more relevant to this population. As the "greying" of the population increases, as more of the vulnerable groups (physically handicapped; developmentally handicapped, etc.) participate in the marketplace and as the complexities of the transaction, services and products increase to create additional environmental vulnerabilities, the vulnerability factor will assume more and more importance in determining whether to intervene, in what manner, and on whose behalf.

3) Who should intervene

At first, the response to this question would appear relatively straightforward - the answer being the Ministry at some level (Minister, deputy and/or assistant deputy minister, director, registrar, inspectors, consumer services officers). However, in determining the level and nature of intervention, other interventionists may be identified. The following options are possible:

a) If self-regulation is seen as a viable option, industries could regulate their memberships, excluding the Ministry from any ongoing involvement;

b) A variation of self-regulation could be to formally acknowledge the existence of industry associations and, through negotiations or legislation, play a mediating and/or more minor controlling role;

c) Another possibility would be to create independent or quasi-independent organizations to oversee and administer certain programs and expectations (e.g. New Home Warranty Program);

d) Specific systems could be established either through negotiation or legislation; systems that would automatically become active in certain situations. The Ontario Motor Vehicle Arbitration Program is one existing example. A system proposed by the review team would be the would be the consumer lien concept wherein consumers who had made prepayments or deposits would become secured creditors if a business went bankrupt.

e) Another interventionist could be the consumer, either individually or collectively. Legislative Review proposals include consumer injunctions and declaratory relief (as direction to the court), as well as legislation to assist the consumer in obtaining private relief. Another proposal is that consumer class action suits be facilitated.

f) Advocacy groups could provide an additional interventionist avenue. However, unlike the United States, advocacy groups are not common in Ontario; usually, they are organized to deal with one issue which, once resolved, results in the group disbanding. Ministry encouragement and support could create and sustain more of these groups.

CONCLUSIONS

As evident from the preceding discussions, a standardized formula approach to determining level and nature of intervention, given specific conditions and criteria, would not be appropriate. Instead, a thorough appreciation of the unique circumstances of a situation should decide the need.

Above all else, flexibility, proportionality and the focus on a fair marketplace would assure a rational and consistent manner of intervention.

APPENDIX

Administrative Procedures and Intervention Mechanisms

The attached matrix provides common and unique administrative procedures and intervention mechanisms in the existing regulatory legislation that was under review. The matrix does not concern itself with identifying provisions which are specific to certain industries (for example, cost of credit disclosure provisions and executory contracts under the Consumer Protection Act).

The most desirable situation is to include so-called "generic" administrative procedures and intervention mechanisms in future foundation legislation and have the industry-specific legislation specifically refer to the foundation bill on administrative procedure and intervention mechanism matters.

APPENDIX (Cont.)

MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS

BUSINESS PRACTICES DIVISION

ADMINISTRATIVE PROCEDURES / INTERVENTION MECHANISMS

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W
REAL ESTATE & BUSINESS BROKERS ACT	X	X	X	X		X		X	X	X	X	X	X	X	X	X			X	X	X 1	X	X
COLLECTION AGENCIES ACT	X	X	X	X		X	X	X	X	X	X	X	X	X	X	X			X	X	X	X	X
CONSUMER REPORTING ACT	X	X	X	X		X		X			X		X			X			X	X	X	X	
MOTOR VEHICLE DEALERS ACT	X	X	X	X		X		X	X	X	X	X	X 2	X	X	X			X	X	X 1	X	X
TRAVEL INDUSTRY ACT	X	X	X 3	X	X	X	X	X	X	X	X	X	X	X	X	X	X 4	X 4	X	X	X 1	X	X
CONSUMER PROTECTION ACT (Itinerant)		X	X	X		X		X	X	X			X			X				X	X	X	
ONTARIO NEW HOME WARRANTY ACT	X 5	X	X 6	X		X			X 11												X		
BUSINESS PRACTICES ACT					X 7	X 8					X	X	X	X					X		X		
BAILIFFS ACT		X 9	X 10			X							X 2, 11								X 12		
PAPERBACK & PERIODICAL	X 13	X	X 14			X	X		X	X		X	X						X	X	X	X	
DISCRIMINATORY BUSINESS PRACTICES ACT					X 7	X 8					X	X						X		X 15	X		

LEGEND

A	REGISTRAR
B	NEGATIVE REGISTRATION
C	CONDITIONS OF REGISTRATION
D	REFUSAL TO REGISTER
E	INTERIM SUSPENSION
F	NOTICE OF PROPOSAL TO REFUSE OR REVOKE
G	RESIDENT REQUIREMENTS
H	INVESTIGATION OF COMPLAINTS
I	INVESTIGATION
J	POWERS OF INSPECTION
K	INVESTIGATION ON ORDER OF MINISTER
L	INVESTIGATION BY DIRECTOR (POWERS)
M	MATTERS CONFIDENTIAL
N	ORDER TO REFRAIN FROM DEALING WITH ASSETS
O	FURNISHING MATERIAL TO REGISTRAR
P	FALSE ADVERTISING
Q	APPOINTMENT OF RECEIVER/MANAGER
R	APPLICATION RE DISPOSITION
S	SERVICE
T	RESTRAINING ORDERS
U	OFFENCES
V	CERTIFICATE AS EVIDENCE
W	NOTICE OF CHANGE

NOTES

1	MINISTER'S CONSENT
2	COURT
3	THEFT, IMMIGRATION
4	BILL 63
5	CORPORATION CREATED
6	TECHNICAL COMPETENCE
7	IMMEDIATE COMPLIANCE
8	CEASE UNFAIR PRACTICE/ ASSURANCE OF VOLUNTARY COMPLIANCE
9	APPOINTMENT
10	APPOINTMENT PROCEDURE
11	INSPECTORS APPOINTED
12	LIMITED
13	BUSINESS AREA
14	LIMITED DETAIL
15	DOUBLE PENALTY

March 9, 1987

13. Registration and Licencing

REGISTRATION AND LICENSING

BACKGROUND

In order to meet the overall objective of consumer protection in marketplace transactions, governments have found it necessary to regulate certain occupations specifically.

Occupational regulation may take several different forms (usually registration, certification, or licensing).

Registration is basically a system requiring that all persons or businesses engaged in a certain occupation list their names and addresses with a government agency. The conditions for registration are usually fairly general.

Certification involves the granting of recognition by a government agency or private body that an individual has met the qualifications specified by the certifying body.

Licensing consists of the granting by government, often through a delegated body, of the right or permission to carry on a trade, business, or profession. Those licensed have exclusive jurisdiction over a set of trade activities, and usually have the exclusive use of a specific title.

GENERAL PROBLEM AREAS

Diversity of the occupations regulated

The Business Practices Division of the Ministry regulates diverse occupations, including itinerant sellers, motor vehicle dealers and salespeople, collection agencies and agents, consumer reporting agencies, real estate brokers and agents, bailiffs, travel wholesalers and agents, paperback and periodical distributors, and projector operators.

In some instances, the decision to regulate an occupation (i.e. paperback and periodical distributors) has been ad hoc and reactionary, rather than strategically planned with a cost-benefit analysis.

A question arises as to whether it is possible to utilize more systematic criteria in the determination of the need for regulation of an occupation.

Diversity of terms of regulation

There is a wide variation in the terms of regulation of the occupations which must register with the Ministry, the level of education or training required of the regulated, the volume of economic activity affected, and the benefits and costs that arise from the regulation.

It may be possible to develop and include standard regulation provisions in the new foundation statute.

SPECIFIC ISSUES

1) What particular criteria should the Ministry use in the determination of the need for regulation of an occupation?

2) What specific standard regulation provisions should be included in the new foundation statute?

3) Should the foundation statute deal with certification or licensing of occupations, in addition to registration, or should these more specific provisions be dealt with in industry-specific legislation?

PROPOSED DIRECTION

1) A model for the Ministry to use in determining whether an occupation needs to be regulated is outlined in the section of this report, titled "The Development of a Model of Assessment and Intervention: Towards an Intervention Philosophy", within the chapter, "Foundation Legislation: Introduction".

2) It would be very difficult to incorporate all of the requirements for registration of each industry in the foundation statute. However, it would be beneficial for the Ministry to consider implementing a list of generic registration provisions in the foundation legislation, which would specify what particular situations would generally lead a registrar to refuse, to revoke or not to renew a registration.

The identification of situations where the applicant may be refused registration has been used in the legislation of British Columbia and Manitoba, as well as in the United States.

It is recommended that the foundation statute include a detailed generic registration section as follows:

The registration or renewal of registration of an applicant may be granted except where:

a) a person who

    i) has been convicted of any offence against the Criminal Code (Canada), or

    ii) has been convicted of an offence against this Act, or

    iii) has been convicted of any other offence in Canada, that in the opinion of the director involves a

dishonest act or intent on the part of the convicted person; or

b) a person who is an undischarged bankrupt; or

c) a person who has, within the last ten years, been bankrupt or has been a director of a corporation that became bankrupt while he/she was a director, unless, in each case, the creditors in the bankruptcy have been paid in full; or

d) a person whose registration under this Act, or whose registration under another act has been cancelled or is, at the time of application under suspension; or

e) a corporation, one of the directors or managers of which could be refused a registration under clause (a), (b), (c) or (d); or

f) a person who has made a material mis-statement in his/her application for registration; or

g) a person who fails to comply with any provision of the Act; or

h) a person who has not complied with any applicable federal, provincial or municipal statute, regulation or by-law; or

i) a person who has demonstrated incompetency or untrustworthiness; or

j) a person under circumstances where the director is of the opinion that it would be injurious to the public interest to grant registration.

The foundation statute should also incorporate the following provisions:

1) Consequences of failure to register;

2) Non-transferability of registration;

3) The requirement to register in order to maintain a legal action against a consumer; and

4) The right of a consumer to void a contract if the individual is not registered.

Incorporation of these provisions in the foundation legislation will preclude any need to duplicate such a section in industry-specific legislation.

3) It is recommended that the more "problematic" occupations, which require certification or licensing, should be dealt with in industry-specific legislation, rather than in the foundation statute.

Generic regulation provisions in the foundation statute should be designed to establish minimum standards of entry into an occupation.

Questions concerning the "skill" or "competence" of an applicant to an occupation should be addressed under the unique certification or licensing provisions of industry-specific legislation. The lack of commonality in determining the level of "skill" or "competence" among different occupations necessitates separate industry-specific legislation to handle these issues.

14. Methods of Financial Protection of Consumers

METHODS OF FINANCIAL PROTECTION OF CONSUMERS

BACKGROUND

Many business-consumer transactions require a consumer to prepay or otherwise deposit funds with a business prior to receiving the services or goods desired.

Examples of such transactions include prepayments for services from fitness studios, layaway for purchasing merchandise, deposits for custom-made goods or for goods such as furniture, down payments for the purchase of real estate and deposits toward home improvements.

The consumer expects the entire prepayment or deposit to be applied against the purchase price of the services or goods.

Unfortunately, a problem sometimes arises when the business becomes insolvent prior to providing the services or goods which had been purchased by the consumer but not yet delivered. The Ministry receives numerous complaints from consumers who have placed money on deposit with a business to purchase a product or service, and subsequently have lost this deposit when the business became insolvent.

In particular industries, the Ministry administers legislation which offers the consumer protection from financial loss of this type. There are three forms of concrete, direct protection: bonding, compensation funds and trust accounts.

- A bonding provision requires a registrant, for example a door-to-door seller, to maintain a bond ($5,000 in most cases). Should the seller default on his or her obligations, this bond is available to consumers who have lost deposits. Bonds are purchased from insurance companies, in exchange for yearly premiums.

- A compensation fund will reimburse customers who do not receive goods or services they have paid for, in certain situations such as a business bankruptcy. Purchases of automobiles and travel services are protected in this way, since all registrants doing business in those fields must contribute money to support compensation funds in the automobile and travel industries.

- Clients of a business may also be protected if deposits which the business receives are placed into a trust account, where the business has no access to them until the consumer has received the good or service in question.

GENERAL PROBLEM AREAS

1) Existing methods of financial protection are only feasible in regulated industries, where businesses must be licensed or

registered with the provincial government. They do not apply to the majority of marketplace transactions. The Ministry has recently tabled legislation to provide protection to consumers who prepay for services such as health, fitness, diet or dance services. This legislation requires a business to maintain a "prepaid contract trust account".

This does not solve the problem in a comprehensive way. Most consumers prepaying for goods or services are still not protected in the event that the business becomes insolvent. If the business has assets or funds in bank accounts, even if the particular goods that the consumer was buying are on the premises, the consumer may still not receive any portion of his or her prepayment back. Business creditors and financial institutions are likely to claim all monies and assets possessed by an insolvent business; the consumer has no priority in the distribution of these funds or assets, even though a consumer was not intending to bear the risk that other creditors knowingly and intentionally undertake.

2) There are areas for improvement in the provisions of the present industry-specific legislation, dealing with trust funds. For example, as a result of the review team's analysis of the Real Estate and Businss Brokers Act and its application to the marketplace, it was noted that current industry practices relating to trust funds do not follow the requirements of the Act. This matter is dealt with further in the chapter of this report related to the housing area.

3) The operation of bonding provisions and compensation funds could be upgraded, in response to changes in the marketplace and the Ministry's experience in dealing with these types of financial protection in industry-specific areas.

4) Consumer losses in certain areas, such as new home purchases and home improvements, may warrant the introduction of specific measures for financial protection in those areas.

5) The advantages and disadvantages of either bonding or compensation funds should be weighed by the Ministry each time it considers what form of financial protection to provide for consumers in a particular industry area.

SPECIFIC ISSUES

1) The introduction of a consumer's lien in the new Consumer Protection Code, similar to that recommended by the British Columbia Law Reform Commission, should be considered. Such a lien would make consumers secured creditors of businesses that receive prepayments and deposits, and then go bankrupt. The consumer would share a priority claim to the contents of business accounts into which proceeds of retail sales had been deposited. The consumer's position could be further strengthened by extending the lien to the actual goods to be purchased, in cases where the transaction concerned goods as

opposed to services.

2) There is a need to tighten the control and operation of those trust accounts currently required by industry-specific legislation, to ensure that they fulfill their intended purpose. In cases where large amounts of money are held in trust for some time, the interest earned on that money is not a negligible sum. The issue arises as to whether such interest should be allocated to the consumer instead of to the business holding the money. While the money is in trust, it is not actually the property of the business.

3) Should the present bonding and compensation fund systems be revised? Problems with bonds include insufficient protection, difficulty for businesses in obtaining them, inflexibility, and delays in consumers obtaining access to them.

4) Are any new bonding requirements or compensation funds needed?

5) What particular criteria should be considered in introducing bonding or compensation funds for the protection of consumers?

PROPOSED DIRECTION

1) It is proposed that the Ministry introduce a consumer's lien in the new Consumer Protection Code.

2) It is proposed that provisions dealing with trust accounts be tightened to ensure that trust funds are better protected and that the interest earned is properly distributed to the consumers concerned. Minimum requirements should be incorporated within the foundation statute, and specific requirements into industry-specific statutes. Such requirements could include time limits on depositing funds into trust accounts, identifying acceptable financial institutions (i.e. within Ontario), placing stronger controls on cheque-signing authority, and "winding up" provisions for registrants ceasing operation.

3) The Ministry should consider improving the present bonding system under the Consumer Protection Act for door-to-door sellers, as follows (refer also to the section in this report on door-to-door sales under the chapter titled "Foundation Legislation: Marketing Practices"):

- The size of bonds should be increased in order to more accurately reflect the prices of today's consumer goods, but the bonds should be tailored according to the size of the seller's company;

- Bonds should be made more accessible to consumers.

4) The Ministry should give consideration to the introduction of compensation funds under the Real Estate and Business Brokers Act, and in the home improvements industry. Significant consumer losses occur in both industries. These matters are dealt with further in the chapter concerning the housing industry. The Ministry should undertake consultation with the respective industry associations on this proposed direction.

5) In the analysis of whether to introduce, revise or eliminate these forms of financial protection for consumers, the Ministry should consider the following advantages and disadvantages of bonding and compensation funds:

Bonding-Advantages

a) Competent registrants do not pay for the failures of other businesses; and

b) Bonding may assist in preventing certain unsuitable persons from obtaining a bond. If the guarantor believes the individual or firm is too great a risk, it may refuse to offer the bond even though the registrar has determined that the person is suitable for registration provided the bond is in place.

Bonding-Disadvantages

a) It can be difficult for the guarantor to accurately assess risks;

b) Bonds are often required only in situations in which a risk of consumer loss already exists. This makes it difficult for an insurance company to offset low risk against high risk;

c) Bond levels are often inadequate to cover the actual risk. The consumer may not receive adequate compensation if the bond is prorated among a number of claimants, and the return can be low in terms of premium paid. A bond that accurately reflects true risk could be prohibitively expensive. As requirements and premiums increase, insurers cannot expect full security and therefore, must take on more real risk themselves. Reinsurance for the bond also becomes more difficult to obtain. These factors can decrease bond availability and, therefore, threaten one's ability to be licensed;

d) Bonding requires constant administrative checking to ensure bonds are being maintained;

e) Consumers are given a false sense of security when told that the business has bonding protection;

f) Inadequate bond amounts can also mean that administrative costs for insurers and government are high in proportion to protection offered. Letters must be filed each time a bond is purchased, renewed, not renewed, etc., and costs are incurred

by insurers when recovering security and personal guarantees. If premiums only cover administration costs and a small margin, the availability of bonds could again decrease because the insurer is not motivated by profit to issue the bond. The guarantor does not have a duty to insure the risk;

g) When a bond is forfeited, it ceases to exist and its full amount must be paid out. The licensee must find a new bond if he or she wishes to remain licensed. Forfeiture of one bond will make a second bond more difficult to obtain. To avoid forfeiture, the licensee must pay the full amount from his or her own resources;

h) If an applicant does not have adequate credit to cover the security required by the guarantor, he or she can be blocked from being licensed and, therefore, from doing business. The lack of credit may not be directly related to the risks involved;

i) The consumer usually must wait two years to receive compensation because the bond is held to determine whether there are any other claims against it, as it must be divided among all claimants;

j) If the insurance company failed financially and ceased operations (i.e. the collapse of Pitts Insurance Company a few years ago), the bondholder would lose his or her coverage, be unlicensed and be unable to reclaim premiums paid except through liquidation procedures, and the consumer would not be able to attach to any funds; and

k) Businesses dealing with different companies could pay different amounts for protection, depending on how companies pass the bond cost on to the business.

Compensation Funds-Advantages

a) Although claim limits are usually set, consumers generally have a better chance of receiving full or more adequate compensation than they do under a bonding system;

b) With a compensation fund, as opposed to a bonding system, businesses would be able to free up funds paid as premiums for bond or held as security for bonds;

c) Compensation is received more quickly;

d) All licensees must contribute to the fund, regardless of the actual or perceived risks associated with his or her being licensed or his or her ability to put up the required security for a bond. Therefore, a business is not dependent on an insurance company's judgement for its existence;

e) An industry-funded compensation fund encourages industry members to work closer together, because each participant has

a vested interest in keeping the industry strong and healthy. Claims on the fund will cost the entire industry;

f) If a payment is made from the fund because of an act by a specific licensee, the licensee can continue to operate. His or her licence is not suspended (as with a bond), and his or her ability to continue contributing to the fund is not impaired unless the registrar determines that the action leading to the consumer loss and payment from the fund was sufficient reason for suspension or cancellation of the registration; and

g) As with bonds, fund assessments can be adjusted to reflect the risk a particular licensee poses to the fund. For example, under the existing Travel Compensation Fund, wholesale registrants pay more than retail agencies because they are more likely to fail, leaving larger numbers of affected customers.

Compensation Funds-Disadvantages

a) The viability of such funds, in terms of their ability to cover claims, reasonable assessments, administration costs per claims made, etc., increases in the jurisdictions where business volumes are highest, and where there are high volume, low risk firms participating. In businesses with low volumes, the costs associated with a compensation fund may be too great to bear if the number of consumer losses reported is substantial;

b) Although fund assessments can be adjusted to reflect risk, this may only be feasible if the licensee belongs to a certain class of licensee (e.g. travel wholesaler). The assessment of the actual risks associated with specific licensees would be very difficult, as it is with bonding;

c) Compensation funds tend to offer specific protection limits, whereas bonds offer general protection, in terms of criteria for a consumer to claim against the bond;

d) Consumers may not be as vigilant in consumer purchases because, under a compensation fund system, government could be perceived to be willing to "bail them out" when they make poor choices and lose money; and

e) A compensation fund would be difficult to apply in an area involving the sale of diverse products or services, due to the fact that the fundamental issues and problems are not the same (i.e. how to base a fee structure for a compensation fund in an area of business that is not homogeneous).

15. Administrative Enforcement Measures

ADMINISTRATIVE ENFORCEMENT MEASURES

BACKGROUND

Varying degrees of administrative authority over business activity exist in most North American consumer protection legislation.

Registration, licensing, bonding, compensation funds and trust funds represent some of the preventive systems used by government to ensure compliance with the legislation.

Administrative enforcement measures, also known as business sanctions, are also available for use when the preventive systems are not sufficient. Sanctions, such as the Assurance of Voluntary Compliance and the Cease and Desist Order, are available to enforcement officials.

Finally, the government may take legal measures against the business in cases where an earlier order issued by the administration has not been complied with, or where the offending business undertakes a prohibited practice, knowing it to be unlawful.

GENERAL PROBLEM AREAS

1) Research studies have indicated that there is a serious neglect in Ontario of administrative enforcement measures. In total, there are currently seven administrative powers employed by consumer protection enforcement officials - Inspection, Invsetigation, Direction to Furnish Information, Cease and Desist Order, Assurance of Voluntary Compliance, Order to Refrain from dealing with assets, and Restraining Order.

For example, the Assurance of Voluntary Compliance (the AVC) is virtually unused in Ontario, whereas in other jurisdictions, it is employed quite extensively. Reference may be made to the study, entitled Consumer Complaints and Unfair Trade Practices; An Empirical Study of Ontario's Business Practices Act, 1986, by Samuels and Vidmar, with respect to research in this area.

2) The Investigation and Enforcement Unit of the Ministry has most frequently followed the route of legal prosecution under the Criminal Code, rather than administrative procedures, after an investigation which uncovers wrongdoing. The rationale is that it is not necessary under the Code to prove that the business engaged in an unfair practice, knowing it to be an unfair practice, and that the court can, upon convicting the accused, order restitution to the consumer.

3) Less dependence on punitive sanctions is necessary in

order that the Ministry pursue its goal of encouraging an honest and equitable marketplace.

SPECIFIC ISSUES

1) What criteria should exist for the use of the seven administrative enforcement measures now employed by Ministry enforcement officials?

2) What additional administrative enforcement measures can be introduced?

PROPOSED DIRECTION

1) Strengthen Information-Gathering Mechanisms

a) Direction to Furnish Information

It is recommended that Ontario introduce the "Direction to Furnish Information" into the proposed Consumer Protection Code. This direction would be similar to the "Civil Investigatory Demand" (C.I.D.) common to U.S. jurisdictions, as it could be utilized when the director, or registrar in the industry-specific Acts, believes that some contravention had occurred; it would not require the "probable cause" standard appropriate for criminal search warrants. This type of direction presently exists in industry-specific legislation. Extension of this power to the director of the Consumer Protection Code would bring all Ministry legislation into harmony.

b) Clarify procedures for inspection

i) Use of general inspection powers

The general inspection power should be at the discretion of the industry-specific registrar, who would have the authority to determine that an inspection is necessary and would delegate the task to the Compliance section. This section would then determine whether the inspection is to be carried out by local or regional staff.

ii) Inspection based on a complaint

An inspection based on a complaint would be available when the Direction to Furnish Information does not result in successful resolution of the complaint. This inspection power should rest with the registrars under industry-specific legislation, but should also be extended to the director under the Consumer Protection Code.

iii) Present requirement for written complaint

Finally, the current requirement that complaints be in writing should be eliminated. This removal would greatly enhance consumers' access to administrative enforcement, as noted in the report of the Consumer Advisory Panels, undertaken as part of the Legislative Review Project, in August 1987:

"...the chief area of administrative procedure concerned government's perceived rigidity in requiring the public to submit complaints in writing with no apparent flexibility to assist those who need help. Once again, reference was made to the high percentage of functionally illiterate consumers in Ontario."

c) Clarify procedures for investigation

It is recommended that the investigation power, currently employed only in cases of highly injurious or repeated contravention of the legislation, be expressly limited by legislation to those specific situations. The director's exercise of the power to order an investigation would require the current prerequisite of "reasonable and probable grounds," and would likely be preceded by an inspection.

2) Clarify Scope and Availability of Current Sanctions

a) Assurance of Voluntary Compliance

The authority to issue an AVC should be extended to the registrars under the industry-specific Acts, and retained for the director under the Consumer Protection Code.

The AVC should be more frequently used as an option after mediation and preliminary enforcement procedures, but before investigation.

b) Cease and Desist Order

The interim suspension power presently available to the registrar of the Travel Industry Act should be made available to all registrars under the industry-specific Acts.

Present Cease and Desist Orders within the Business Practices Act are recommended for inclusion into the Consumer Protection Code as powers conferred on the director.

However, the director's order should be subject to a hearing before the Commercial Registration Appeals Tribunal prior to taking effect. In addition,

C.R.A.T. should have the power to provide a compensation award to the consumer when confirming the Cease and Desist Order.

c) Remove Restraining Order

It is recommended that the Restraining Order be removed from all Ministry legislation, due to the fact that the existing Cease and Desist Order makes the Restraining Order redundant.

3) Introduce Administrative Sanctions Proven Successful

a) Substitute action

It is recommended that a substitute action be introduced into the Consumer Protection Code, whereby the Ministry could take civil proceedings on behalf of a consumer, or a class of consumers, in response to a violation of the legislation. It may be noted that British Columbia presently has such a provision in its consumer protection legislation.

b) Suspension or revocation of registration

It is proposed that the new Consumer Protection Code include a general clause, which would authorize revocation/cancellation by the director of a business licence if the business has engaged in a prohibited activity. This generic legislation could replace similar provisions in all of the existing industry-specific Acts.

c) Order to refrain from dealing with assets

The recent amendments to the Travel Industry Act, that provide the Ministry with authority to apply to court for the appointment of a receiver/manager, and for the disposition of assets frozen under the Restraining Order, are recommended as powers of the director under the Consumer Protection Code.

d) Confidentiality

Ministry staff should be able to disclose information to other law enforcement agencies, and to other ministries or government agencies responsible for the administration of legislation which may be related to that of the Ministry of Consumer and Commercial Relations (e.g. the Ministry of Financial Institutions).

Ministry staff should also be educated as to the extent of assistance which they can provide to consumers under the new legislation. They should be encouraged to provide advice in preparation for court

cases and to act as witnesses in court, specifically when consumer complaints appear to justify action against the business.

e) Local enforcement

An increase in the responsibilities of complaints officers will necessitate better communications with the regional offices. In this regard, it is recommended that meetings of all Ministry regional staff occur at least every three months.

4) Encourage Administrative Prevention over Intervention

a) Regulation-making

No Canadian legislation currently authorizes consumer protection departments or agencies to issue new rules regarding unfair or prohibited business practices, as does the legislation in the United States, England, and Australia.

The Commercial Registration Appeals Tribunal presently debates concerns and issues relating to Ministry Acts and regulations in its annual meeting. However, formal action is rarely taken by the Ministry as a result of CRAT discussions.

It is recommended that these annual meetings be used more effectively by the Ministry. Research leading to law reform should be made part of the formal CRAT mandate, such that concerns raised by members at annual meetings be subject to serious and comprehensive review. A special research committee could be formed in the Ministry to review CRAT recommendations regarding Ministry legislation.

b) Policy guidelines

In order to give clarification to the broad definitions often found in legislation, specific policy guidelines are recommended. These guidelines should be issued by CRAT, with input into the formulation of the policy to come from the Ministry research committee.

In order that CRAT be perceived to fairly represent both consumers and business, it is proposed that the composition of this tribunal be amended to include equal representation from consumer interest groups and from industry.

The policy guidelines would be publicized, and would be binding in the sense that they would be followed by the Ministry in its enforcement activities.

16. Consumer Remedies

CONSUMER REMEDIES

BACKGROUND

Under common law, if a consumer is injured by an unfair or deceptive business practice, the consumer may sue in tort (i.e. for personal injury or negligent misrepresentation), or in contract (i.e. for breach of contract or unconscionability of the transaction). In such an action, the court could remedy the situation by rescinding the contract (an equitable remedy), by restoring the consumer to the financial position he or she was in prior to entering into the contract, and by awarding damages in certain circumstances.

Despite the tradition of common law and equitable remedies, there have still been some gaps in legislation through which some unscrupulous people could structure their contracts, thereby imposing unfair terms and obligations upon the other party to the agreement. Consequently, legislatures have recently intervened to create statutory provisions and remedies, which would enable the courts to help consumers.

GENERAL PROBLEM AREAS

1) There are a limited number of remedies available to consumers when they are subjected to a business practices which are unfair, deceptive, or unconscionable. Under certain circumstances, rescission of a contract is possible, and, in the case of unconscionable representations, exemplary or punitive damages may be awarded by the court.

2) Comprehensive consumer protection legislation should provide a wide range of private, administrative and criminal remedies. However, Ontario falls quite short of other jurisdictions in Canada and the United States in this area.

SPECIFIC ISSUES

1) What remedies should be available to consumers when businesses deal unfairly or deceptively with them?

2) What penalties can be imposed against a business in a prosecution situation?

PROPOSED DIRECTION

Comprehensive consumer protection legislation should provide the appropriate mix of private, administrative, and criminal remedies and sanctions, for the following reasons:

- The threat of comprehensive redress provisions would provide an effective deterrent to unfair practices in the

marketplace, and would encourage businesses, particularly through their trade associations, to promote a fair marketplace environment;

- A wide range of remedies would address the diversified and complex disputes that may arise, and allow for the creative resolutions of such disputes;

- In the event that mediation is not successful in a particular dispute, and arbitration is not viable, successful court action should enable the consumer to be compensated for the time and expense of taking legal action on a relatively small claim;

- The availability of more effective consumer remedies would satisfy the public need to perceive that justice is being done; and

- Maximum protection and benefit would be provided to consumers if more remedies were available to them.

Therefore, it is recommended that the following additional remedies be made available to consumers:

1) Minimum and Multiple Damages

Minimum and multiple damages provide an incentive to consumers to sue businesses for deceptive or unfair practices; this, in turn, deters other businesses from attempting similar practices.

In the review of consumer protection legislation throughout the United States, it was noted that such damages are provided in a total of 18 states. Although the government should not be actively encouraging consumers to undertake litigation, it may be the only viable alternative in some situations. If court action is undertaken, consumers whose suits are successful should be compensated.

2) Lawyers' Fees, Costs, and Expert Witness Fees

In order to encourage the litigation of individual consumer claims, some American states have specifically provided for an award of costs to a successful consumer. The rationale is that the interests of the business community and the public at large are best served by shifting the burden of the expense of consumer fraud litigation onto the shoulders of those whose unfair or fraudulent acts are responsible for the litigation in the first place.

It is recommended that Ontario's new consumer protection legislation provide for the court, when appropriate, to award lawyers' fees, costs, and expert witness fees to consumers who win their cases.

3) Class Action and Substitute Action Relief

The procedural mechanism known as a "class" action is a civil action brought by one person or more, on behalf of others having similar grievances, or against one person or more defending on behalf of a group of people.

In 1982, the Ontario Law Reform Commission completed a six-year study on class actions and submitted a comprehensive 880-page Report on Class Actions to the Attorney General. The Commission was of the opinion that:

> "since on balance, the benefits to be derived from class action, in terms of judicial economy, increased access to justice, and behaviour modification, outweigh the costs of such actions, a new and expanded class action procedure should be adopted in Ontario. The procedure should be designed, however, to permit courts to preclude inappropriate class actions on a case-by-case basis."

The Commission made a number of recommendations in the report and concluded by producing a 57-section "generic" Class Action Act.

It is proposed that the Ministry of Consumer and Commercial Relations consult with the Ministry of the Attorney General with regard to the introduction of class actions in Ontario, which would be of considerable benefit in the consumer protection area.

Another consumer remedy, presently available in British Columbia and Saskatchewan, is the "substitute action". It enables third parties, including government officials, to sue a business on behalf of any person or class of people who have suffered a loss as a result of an unfair or deceptive trade practice.

It is proposed that the new Consumer Protection Code in Ontario include such a provision, in order to benefit aggrieved consumers who do not have the time, resources or motivation to pursue a legitimate claim against an unscrupulous business on their own initiative.

4) More Effective Fine Provisions

Minimum fines provided for in Ontario's present legislation are lower than in most other provincial jurisdictions.

It is proposed that the minimum and maximum fines be substantially increased in the new legislation, that a provision be included for the doubling of fines if a business is convicted twice, and that a clause be included for the seizure and sale of business property to pay the fine, if it is still outstanding after an unreasonable length of time.

5) Compensation Orders

Ministry enforcement staff often use the Criminal Code to lay charges against a business, rather than existing consumer protection legislation, due to the fact that restitution is available to consumers under the Criminal Code.

It is recommended that the Ministry include in its new legislation provisions to compensate consumers, as does British Columbia.

6) Removal of the "Knowingly" Provision in the B.P.A.

An individual is guilty of an offence under Ontario's current consumer protection legislation if he or she engaged in an unfair practice, knowing it to be an unfair practice. This "knowingly" requirement has frustrated prosecutions under the existing Business Practices Act.

A study by the Federal Law Reform Commission has concluded that the minimum standard for criminal liability in all regulatory legislation should be negligence and that an accused person should not be convicted of a regulatory offence if the person establishes that he or she acted with due diligence - that is, that he or she was not negligent.

On this basis, it is recommended that the "knowingly" requirement be removed from the offences provision, and that any business which is charged be permitted to raise the "due diligence" defence.

17. Dispute Resolution Mechanisms

DISPUTE RESOLUTION MECHANISMS

BACKGROUND

Is it necessary to have an alternative to the traditional court system? If so, what structure can best improve upon the forums currently available?

Equality before the law is a concept central to the democratic tradition. It requires that everyone, regardless of wealth or status, should have access to the justice system to resolve grievances.

However, an analysis of contemporary legal and sociological literature in the area of access to justice demonstrates that traditional justice is not available to many in our society. In a recent Toronto Star article (Oct. 27th, 1987), the president of the Canadian Bar Association stressed the average Canadian's growing isolation from provincial courts:

> "The rich can afford law and lawyers and the poor are entitled to assistance such as legal aid, but to those neither rich nor poor (the vast majority of Canadians), access to justice through the courts is being denied ..."

The recent growth of the welfare state highlights the importance of individual access to justice. The creation of new rights affecting all individuals (tenant, worker, consumer, etc.) is meaningless unless recipients are in a realistic position to have them enforced. Although we are not all spouses, workers or landlords, we are all consumers. As such, for almost a quarter of a century, we have had laws declaring that certain rights belong to us. However, it has been estimated that over one-third of the province's residents, largely those with middle incomes, are unable to afford a lawyer when they need one. Upon consideration of the many consumer transactions that result in a dispute, and also the high degree of failure by the mediation services in provincial consumer complaints offices, it is apparent that there is a pressing need for some alternate form of readily available dispute resolution.

In the 1960's, North American governments began to respond to what was even then an obvious need, by introducing the Small Claims Court. Currently, every province in Canada has this forum, created for the use of those unable to afford the proceedings of higher courts; however, in practice, it is employed almost excessively by the more powerful to collect from their less affluent debtors.

Whatever reform or alternative is ultimately chosen to ensure all individuals are capable of bringing their disputes to an effective resolution, the mechanisms, procedures and

experiences of other jurisdictions must be closely examined, so that a more effective alternative to the Small Claims Court system may be found.

GENERAL PROBLEM AREAS

1) Consumer cost in using the judicial system to solve disputes is often prohibitive, and the processing of a consumer-business dispute through the Small Claims Court system is time-consuming.

The Zuber Report, commissioned by the Attorney General in 1987 to review and make recommendations on reform of the Ontario court system, pointed to the "inaccessibility" and "inefficiency" of the Small Claims Court system.

2) Consumers are not usually motivated to use lawyers or the Small Claims Court system to resolve disputes.

A report of the Consumer Research Council, commissioned by the federal government in 1974 to study redress mechanisms and their effectiveness, was highly critical of the Small Claims Court. The author, Pamela Sigurdson, now a judge with the Ontario Small Claims Court, concluded that the major users of these courts, both in the United States and Canada, are finance companies, banks, retailers and collection agencies.

3) Individual attempts at dispute resolution in consumer transactions are mostly ineffectual, as evidenced by the 1987 Consumer Opinion Survey undertaken as part of the Legislative Review Project.

According to this survey, the vast majority of those who had experienced dissatisfaction with a good or service (91%) indicated that they did complain about the problem. However, of those who complained, the percentage who gave up because they were "unable to get satisfaction" increased from 22% in Ministry surveys in 1980 and 1983 to 36% in 1987.

The following table provides statistics from the 1987 Consumer Opinion Survey, in relation to user-satisfaction with the available complaint process:

Degree of Satisfaction	1987
Extremely satisfied	8%
Somewhat satisfied	14%
Somewhat dissatisfied	16%
Extremely dissatisfied	51%

The 1987 survey also asked where consumers with problems go to seek resolution.

Fifty percent go directly to the retailer when first experiencing a problem, but over 65% have been dissatisfied or

extremely dissatisfied with the result.

The second most popular recourse for consumers with complaints is going to the manufacturer (10%). However, more than 75% of this group have been dissatisfied or extremely dissatisfied with the result of their complaint activity.

Approximately 7% of complaints have been taken first to the Better Business Bureau, but the degree of dissatisfaction has been close to 70% with this course of action.

Finally, close to 7% of dissatisfied consumers have complained to the provincial government, of which over 80% have been dissatisfied with the outcome.

It appears, therefore, that when consumers obtain the assistance of third parties (the Better Business Bureau, government, etc.), they are still often forced to give up without receiving a satisfactory resolution of their complaints.

SPECIFIC ISSUES

1) How can access to Small Claims Court be improved, so that consumers will be able to more effectively resolve their disputes when they decide to take court action?

2) Should concepts such as OMVAP (Ontario Motor Vehicle Arbitration Plan) or ONHWP (Ontario New Home Warranty Plan) be extended to a more general application?

3) Should an "Office of the Consumer Ombudsman" be established?

4) Should an "Office of the Consumer Advocate" be formed?

5) How can mediation services available within the Ministry be improved?

6) Should arbitration for all consumer transaction disputes be legislated?

PROPOSED DIRECTION

It is proposed that the Ontario consumer be given a number of choices as to how he or she wishes to pursue the resolution of a dispute. By providing a variety of options, along with an effective consumer awareness/education program, it is hoped that the natural resistance and fear, which causes most consumers to avoid making a legitimate complaint, will decrease. Fair dealings in the marketplace will only occur when unfair practices are brought to the attention of third parties empowered to take prohibitive action, and when consumers themselves know in advance that such action can

actually result in their redress.

1) Support Small Claims Court Reform

It is proposed that the Ministry of Consumer and Commercial Relations support the passing of the Zuber recommendations for reform of the Small Claims Court system; recommendations that are aimed at encouraging consumers to use the system more.

2) Encourage Industry-Sponsored Programs

It is recommended that the OMVAP Report be carefully reviewed by Ministry officials, with the aim of promoting the establishment of similar complaint resolution boards in industries where the necessary agreement, organization and funding could be achieved. Real estate and travel are two areas which immediately come to mind. Where industry-specific organizations are not in place for the resolution of consumer disputes, the general system which should be made available in the proposed Consumer Protection Code would provide consumers with an avenue for redress. This would include all of the following proposals:

3) Strengthen Enforcement Procedures Available to Ministry

An office of The Consumer Ombudsman (similar to that of Norway and Sweden) already exists, in a sense, within the Ministry's enforcement structure. So, too, does the Swedish and Australian Market Court in the form of CRAT. Both are worthwhile structures necessary to ensure some minimum amount of business compliance with legislative requirements. However, neither is adequate for the resolution of consumer disputes, nor was either so intended. Despite the fact that the proposed directions suggested to the Ministry in relation to administrative enforcement (the substitute action, compensation awards, etc.) may be accepted, only those business violations found to be intolerable by the public enforcement officer will be caught. Although the director/CRAT/compliance officer all play a vital role in the enforcement of the legislation, they do so from a public, and not a private, perspective. Therefore, the issue of how the individual small-item consumer can get access to justice remains unanswered.

4) Establish a Consumer Legal Aid Clinic

A type of Consumer Advocate office is considered beneficial so that there would be a private group empowered to act as government watchdog over efforts to deal with problems faced by consumers. Although the Consumers' Association of Canada (Ontario) has some responsibility in this area, the association concentrates most of its energies on lobbying at the federal level. A specialty consumer legal aid clinic has been recommended in the research related to consumer education and awareness. Such a clinic, as a grass-roots-type organization, would easily and quickly gain expertise in the

area, due to the fact that its clientele would consist only of consumers with problems and concerns arising out of the marketplace. However, such an office would expend most of its efforts and resources on collective problems. It would not, therefore, be an adequate mechanism for dispute resolutions pertaining to the average Canadian, whose income removes him or her from legal aid boundaries.

5) Improve Mediation Services Offered by the Ministry

Mediation is currently the only dispute resolution mechanism specifically offered to consumers by the Ministry. The Canadian Council of Better Business Bureaus' 1985 report includes statistics illustrating an overwhelming success rate in mediation services offered by bureaus across Canada. However, research into Ministry complaint files shows a mediated resolution rate of under 38%. The question which immediately arises is - why does Ministry mediation do so poorly in relation to mediation services offered by other organizations?

Under current legislation, mediation by consumer officers occurs only in response to consumer demand. There is no legislated direction that such bureaus should offer mediation services automatically to consumers with an unresolved complaint against a business or supplier. Further, the Metro Toronto office is an example of the understaffed and underfunded nature of Ministry bureaus: those employees who are responsible for the mediation procedure are also required to answer the telephones and provide consumers calling the Ministry with information and advice. Moreover, these same officers must respond to walk-in consumers seeking information and advice. There are only six such officers employed in the Metro Toronto bureau. Another discouraging factor is that there exists no "800" number; thus, many consumers are forced to pay long-distance charges for no more helpful information than that the lines are presently occupied. Understaffing also occurs in many of the regional offices of the Ministry. Consumer officers at each location are responsible for a wide range of activities - inspection, investigation, mediation, public relations, etc.

It is strongly recommended that more resources and staff be allocated to mediation services currently offered by Ministry information bureaus. Included within this recommendation is the proposal that an "800" number be established, so that consumers in the more remote regions of Ontario will have access to their regional bureaus. Since mediation has been proven successful in the resolution of disputes in a number of areas, it is quite likely that increased resources would result in better services. That would mean a higher rate of resolution than is currently achieved.

It is further proposed that mediation be statutorily provided for in the Consumer Protection Code as the first level of

Ontario Law Reform Commission's Report on Consumer Product Warranties and the Sale of Goods recommended this back in 1972. Once mediation became a well-known statutory duty, consumers who took their complaints to the government would soon realize that the Ministry was an effective complaint-handler. Moreover, business itself could only benefit, in that mediation involves consumers and business agreeing to a mutually acceptable settlement of the issue, which lessens the possibility of customer loss and ill-feeling.

6) Establish a Consumer Complaints Board

Mediation alone is not a sufficient redress mechanism when dealing with parties unequal in bargaining status. Although some businesses which have refused to refund or repair at the negotiation stage, show more willingness to compromise once a government consumer services officer is involved, a significant number do not. The officer has no way of forcing the supplier or business to be reasonable. The consumer, especially an individual small-purchase consumer, has even less clout, except for the threat of going to the media and, thereby, risking public exposure. According to the Toronto Star's Consumer Probe, however, only a small percentage of complaints are actually published. Most consumer complainants are, therefore, powerless in the face of an unreasonable or uncompromising seller or dealer, except for the questionable feasibility of going to the Small Claims Court.

Therefore, it is also recommended that a Consumer Complaints Board be established to operate as an alternative to litigation proceedings before the Small Claims Court. This recommendation would not involve the enforcement of legislation in a collective or administrative manner; instead, it calls for procedures and methods, whereby the consumer is empowered to enter into compulsory arbitration with an alleged violator of the Ministry legislation.

The importance of segregating an arbitration system from the court system was emphasized in the response of the Law Society of Upper Canada to the Zuber Report:

> "Arbitration mechanisms should be improved and made available but preferably as an alternative method of conflict resolution and not as part of the judicial system."

a) Precedent

Although the Australian Small Claims Tribunal is the basic model for the proposed structure, a number of American jurisdictions have also instituted arbitration procedures as an alternative to Small Claims Courts (e.g. District of Columbia, Pennsylvania, Massachusetts, New York and

California) in the field of consumer disputes. In addition, Britain has introduced arbitration alternatives to court for small-value disputes.

The jurisdictional model preferred is that of Australia and, to an extent, California. There are two reasons for this. First, both limit the arbitration option to consumer transactions involving a certain monetary value. This amount, in both jurisdictions, falls within the monetary jurisdiction of the respective Small Claims Courts.

The limitation is based on the recognition that most consumer disputes involving substantial sums of money will be vigorously pursued by a consumer through whatever means are necessary. Moreover, the bigger-ticket items are more apt to have specific legislatively imposed protections, since consumer redress is more readily available where large sums of money are involved. Thus, most industry-specific legislation, including real estate, travel, automobiles and death care, is established precisely because of the larger values attached to the transaction.

It is disputes regarding the smaller-value goods and services which require alternate procedures to the expensive and time-consuming court process for their resolution. Therefore, the Australian/Californian system, with respect to the jurisdiction of the Small Claims Court, is suggested for the Ontario model (i.e. claims up to $10,000).

Secondly, California (again, like Australia) has legislated that the option, once chosen by the consumer, be compulsory for the respondent. Pamela Sigurdson expressed concern regarding this component of any consumer arbitration system over a decade ago:

> "Business interests would be able to frustrate the options of a litigant by simply refusing to go to arbitration as a harassment tactic. Consequently, I recommend that arbitration be allowed whenever an individual litigant, plaintiff or defendant, requests it and the other party is a business."

In a more recent article by Professor W.B. Rayner of the University of Western Ontario (Faculty of Law) entitled: Arbitration: Private Dispute Resolution as an Alternative to the Court, (1984), reference is made to British pilot projects offering arbitration as an alternative to the Small Claims Court on a voluntary basis. The professor points out that several weaknesses are apparent:

> "Because the system is voluntary on both sides, after the claimant registers for arbitration in Westminster, some 40% of the cases (in Manchester, some 60%) failed to proceed because the defendant refused to consent. Such failure rates substantially undermine the utility of the schemes."

The Ontario Labour Relations Act and Farm Products Grades and Sales Act set provincial precedents with respect to requiring a party to participate in an arbitration process, thereby foregoing the right to a judicial hearing. In a similar vein, the provincial Municipal Arbitrations Act mandates arbitration for a variety of disputes which may arise during the exercise of powers under that Act.

Workers' compensation legislation in virtually every Canadian province is another example of provincially instituted hearing boards with sole authority to hear matters brought before them by complainants. Recent Charter of Rights challenges to such workers' compensation systems have reached the appeal level. Recently, the Newfoundland Court of Appeal overturned a lower court decision on the legality of such boards. The appeals court ruled that where a right, i.e. to a judicial hearing, is displaced by such legislation, the validity of the displacement must be tested by the replacement.

> "It is not required that the legislature choose the best method... If the scheme is reasonable and fair when viewed globally, it will not be condemned notwithstanding that it may have imperfections... The Charter was not designed to interfere with beneficial social programs of the legislature."

It is, therefore, suggested that requiring one party's participation, if the other party opts for arbitration binding on the parties, would not likely be determined to be unconstitutional under s.15 of the charter.

It should be made clear that such a requirement to agree to arbitration is not possible under a private system, and can only be imposed under properly enacted legislation. For this reason alone, the OMVAP structure would not be suitable for the type of generic procedure proposed.

Finally, the Report on Consumer Product Warranties and the Sale of Goods by the Ontario Law Reform Commission recommended over a decade ago that both mediation and arbitration procedures be implemented under Ontario's consumer protection legislation. The Consumers' Association of Canada responded positively to the main recommendations made in the report. However, "little interest" was demonstrated by the provincial government "in assuming responsibility for the administration and creation of an arbitral system..."

b) Structure

The following arbitration structure is proposed:

i) Administration within the Ministry:

Administration of the arbitration procedure should be carried out by an independent body which is not only neutral, but is perceived as being neutral by both parties

appearing before it. Without this, the system is likely to fail.

Second, the system must be offered at a nominal cost to the consumer. In the event that an organization, such as the Arbitrators' Institute of Canada, is selected for administering the program, funding is only possible through payments by the parties themselves. However, to ensure the system is accessible to all provincial consumers, and, in order to provide trained and qualified arbitrators, the required funding will be significant. If the purpose of the system is to provide a viable dispute resolution mechanism for the smaller consumer transaction, however, any significant cost to the complainant immediately negates the usefulness of the system. It would not be legally permissible for a private arbitration program to require funding to be met by one party alone; this is only possible through a legislative initiative involving a publicly accountable body. A nominal fee may be required merely to discourage frivolous claims.

Third, the proceeding should be voluntary on the part of the complainant who may, indeed, prefer to pursue the claim within the court setting. Once the individual asserting the complaint has opted for arbitration as opposed to court, the fellow disputant would be required to comply. This requirement is not an element of any private arbitration system currently in effect; nor is it possible under the Arbitrations Act. It is this characteristic which separates the Californian/ Australian consumer arbitration model from that of the British court-ordered arbitration, which is similar to that recommended in the Zuber Report.

Finally, in the event that a conflict occurs, whereby one complainant initiates the proceeding in court and the disputant cross-claims and opts for arbitration, the legislation would provide that the arbitration choice would take precedence.

ii) Mandate

It is recommended that the proposed arbitration board be under the administrative jurisdiction of a Ministry-appointed committee with a public mandate to:

- appoint a list of arbitrators from specific sources made available to the Committee. The list will be made available to the parties, who will then choose which arbitrator is to be appointed for their particular hearing;

- arrange for the forum of the hearing;

- administer and organize a standard training program, in which all listed arbitrators must participate,

prior to being available to disputants (regardless of background, experience, etc.);

- o administer the funding of the arbitration program, including the payment of the individual arbitrators; and

- o report annually to the Minister as to the budget and results of the program.

This proposal envisions the administration of the board by an independent group created by Ministry legislation. Such a statutorily enacted body provides necessary public accountability, ensuring the structure remains subject to the democratic process of scrutiny.

The committee, as proposed, would have no influence on the actual hearings and awards. These would be subject to procedures and limitations set out in the statute itself; therefore, they would be dependent on legislative (and thus public) research, comment and approval.

iii) Composition

The committee would be similar in composition to that of the advisory arbitration committee set up under the Ontario Labour Relations Act, in that it would be composed of three members from each of the two interest groups concerned. Thus, the committee would consist of three industry representatives (e.g. one from the Retail Council of Canada, one from the Canadian Manufacturers' Association and the third from the Chamber of Commerce), and three consumer interest group representatives (e.g. one from the Consumers' Association of Canada, one from the proposed legal aid clinic and the third from an academic position). A chairman would be appointed from outside the group by committee members. The chairman would have the casting vote in the case of a draw.

iv) List of arbitrators

It is recommended that the list of arbitrators made available to the committee be comprised of those members from the lists of the Better Business Bureau and the Arbitrators' Institute of Canada, who are willing to sit on a consumer arbitration panel and are acceptable to the committee.

Further, it is recommended that local consumer bureaus be given the mandate to advertise in their regional areas for people who would meet basic committee criteria, and who would act as arbitrators within that region. Respondents would, of course, be required to undergo the particular selection method employed by the committee prior to being accepted.

This third source of arbitrators is considered necessary for two reasons: one philosophical, the other practical. In the first place, drawing arbitrators from the community may achieve some part of the Neighborhood Justice Centre ideal as promoted in a number of American states, and more recently in Australia. Secondly, the availability of arbitrators within the complainant's community would make arbitration possible even in the more remote provincial regions; also, it would cost less than if arbitrators were chosen only from the heavily-populated south/central region of the province.

v) Qualification and training of arbitrators

It is suggested that, as is the case in the state of Western Australia and the districts of Westminster and Manchester in England, Ontario's consumer arbitrators be required to have legal qualifications. This is not presently required under any provincial arbitration system currently in effect. It is, however, strongly recommended for a number of reasons.

First, arbitrators under the Ontario Labour Relations Act, the Better Business Bureau and the AIC, are currently responsible for their decisions and awards. As such, they are required to take out insurance in order to protect themselves against possible legal claims. This is considered less likely to occur if legally qualified arbitrators, with some experience, background and training in basic legal procedures, are used. Moreover, lawyers are already covered by professional insurance which may limit the cost to the arbitration program.

Secondly, the parties appearing before the arbitrator are seeking justice and judgement, not technical expertise, when pursuing their claim. Both parties must feel equally assured that it is justice, not technical justification, which they will ultimately gain from the arbitration process. Experts in the subject area may, of course, be called upon when a complex technical fact is in dispute, at the discretion of the factfinder. According to Professor Rayner:

> "..in arbitration the risk is run that experts may acquire a bias for or against one theory or another. This is a bias which cannot be brought out in cross-examination [where the expert is also the judge] as it can when expert witnesses are being used to educate the judge.."

Third, the fact that the rules of evidence are not defined, or strictly imported from legal precedent, makes it very important that the adjudicator have knowledge of them and the pitfalls they are designed to avoid. This is especially important where the procedures and formality of the court structure are non-existent and emphasis is

placed on the inquisitorial role of the arbitrator.

Finally, training costs may be less onerous when basic legal rights and protections are already known. Although OMVAP does not require that arbitrators be legally qualified, the number of arbitrators with legal qualifications has been increasing steadily, to the current level of over 60%.

The requirement that arbitrators be legally qualified will result in a training program which would consist of educating arbitrators on consumer protection legislation on which all the claims would be based. Currently, training of OMVAP's arbitrators lasts one day and covers both legal standards as well as the motor vehicle legislation itself. Figures as to the cost of the one-day OMVAP training program were not available when recently requested. The figure given by the Ontario Labour Relations Board, however, is approximately $20,000 annually for training of over 100 arbitrators. The board uses panels of three arbitrators, but that is not recommended for consumer arbitrations due to the expense involved. Therefore, it is suggested that training for consumer arbitrators could be less costly than is presently the case for labour.

vi) Funding of the program

It is recommended that a rationale may be presented to Management Board for the initial funding of the consumer arbitration program through a proposal to increase the costs of registrations and filings by corporations, partnerships and sole proprietorships registered provincially with the Ministry.

Figures from the Registration Division, concerning the annual number of such registrations and filings, suggest that this method would result in enough funds to pay for initial start-up costs.

This method of funding a complaints board is justified because it is the very existence of those businesses operating within the province which has resulted in the need for such a board. The requirement for businesses to make a nominal surcharge of $1.00 or $2.00, when updating or registering their business status with the Ministry, is considered reasonable for initial implementation costs of the program.

Companies registered federally could be required to pay some form of initial filing fee when filing their defence to a claim. As has been noted, the complainant will always be required to pay some nominal sum for bringing a claim before the committee (it is suggested that this sum

remain below the $10.75 minimum currently required under the Small Claims Court procedure for claims under $100).

A further source of ongoing funding could be created by statutory implementation of cost-awards, based on strict criteria established by the legislation itself (e.g. awards for frivolous claims).

Finally, it might be necessary to obtain funding from the Management Board, to cover additional operating costs which cannot be met by additional revenue generated by the Ministry. Such public allocation of funds is justifiable, in that it is the average provincial taxpayer for whom the program is designed.

The Office of Arbitration in the Ministry of Labour spends approximately $500,000 per year to cover the per diem costs ($325 to $350) of arbitrators for 500 to 600 arbitrations a year; arbitrations related to hospitals, human rights and labour. On this basis, the public cost of each arbitration is approximately $1,000. In the event that 2,000 consumer complaints a year might end up with an Arbitration Hearing board (based on the estimate that half of the 4,000 consumers whose written complaints are unresolved each year, would opt for an arbitration hearing), such a board could cost the government in the range of 2 to 3 million dollars a year.

vii) Forum

In an effort to keep costs of the proceeding as low as possible and provide regional accessibility to the process, it is recommended that the committee work with regional consumer bureaus to arrange for the availability of local municipal buildings (townhalls, schools, libraries, etc.) for hearings. Since the hearing would, in most cases, take place in the evening or on a weekend, the use of such premises would not require substantial reorganization or interference with ongoing municipal responsibilities. Thus, any rental fee required would be limited to a nominal sum in order to cover the costs of janitorial services, electricity, and so on.

viii) Jurisdiction of the program

The arbitration option should only be available as an alternative to initiating Small Claims Court proceedings under the Ministry's own legislation. This means, in effect, that arbitration would only be available to a claimant disputing a "consumer transaction" valued at less than $10,000.

It should also be available only after mediation attempts by Ministry officials have broken down. This recommendation is considered necessary in that a mediated,

and, therefore, agreed settlement tends to be more successful and satisfying than an imposed award. It is also proposed so that claimants will not see the more costly arbitration procedure as the sole viable alternative to the courts. It must be noted that litigation would always be available to the claimant up until the arbitration hearing has commenced.

If the purpose of offering this alternate method of dispute resolution is truly a desire to legislate an accessible forum for consumers who cannot meet requirements established by the courts, then business compliance with this consumer choice must be ensured. Although there are many reasons why business should welcome arbitration as an alternative, (including lower costs and greater flexibility in the award) Pamela Sigurdson has pointed out the reality:

> "I was struck by the number of professional firms that took advantage of the Small Claims Court to collect insignificant sums."

Thus, self-interest alone, regardless of any philosophical notions of fairness, will force most businesses to refuse the arbitration procedure, knowing that forcing the consumer to take the claim before the courts will greatly increase the chances of the suit being abandoned. It is therefore recommended that, where mediation attempts have proven unsuccessful, the consumer be given the choice of either dropping the matter completely, proceeding to arbitration, or going to Small Claims Court. To discourage arbitration proceedings, when a reasonable settlement has been offered by the respondent, an initial nominal fee for instituting the hearing will be required from the complainant. Moreover, the arbitrator could be empowered to award some form of costs if the proceeding does not result in an improvement over the settlement offered at mediation, if the taking of the action was not recommended by the mediator, and if the arbitrator considers the complainant's demand for the hearing to have been "unreasonable".

ix) Representation before the board

It is strongly urged that legal representation not be permitted for either party appearing before the arbitration board.

The Consumer Research Council Report, based on Pamela Sigurdson's study, notes a 1975 Vancouver survey which found that approximately 31% of the claims before the Small Claims Court were initiated by lawyers and these were more likely to go to trial than were claims initiated by non-lawyers. Also, although 73% of the people appearing before the Court had no lawyer, 68% of corporations did. A similar study undertaken in Toronto

established that, while 88% of plaintiffs in the Small Claims Court were represented by legal counsel, only 5% of defendants were represented.

At the same time, the experience of OMVAP, which has no restrictions on the use of lawyers, shows that few manufacturers use legal counsel; they often prefer to be represented by their public relations personnel, who are already somewhat familiar with the matter in dispute.

The Australian Small Claims Tribunal bans lawyers altogether. Still, it recognizes that people who are illiterate, inarticulate, or simply shy, may be at a severe disadvantage if they are not allowed any representation.

Therefore, protection has been built into the system to ensure that the corporate or professional entity is not at an unfair advantage. The way in which the Australian tribunal has attempted to safeguard against this is by providing that any agent used by a party will only be allowed if: that agent has personal knowledge of the matter; the other party to the dispute consents to the representation; and the adjudicator also approves the representation on the basis that the other party will not be disadvantaged. This system is particularly effective in removing the "repeat-player" advantage, whereby corporate representatives are able to develop great expertise in facing tribunals.

OMVAP requires that a party intending to employ the services of an agent/representative inform the other party within a certain number of days, so the other party will have time to also retain an agent, should he or she wish to do so.

It is recommended that the Australian approach be chosen over that of OMVAP. According to Pamela Sigurdson's survey of judges in Small Claims Courts throughout the country, all judges were concerned with the lack of justice when only one party was represented. Generally, they felt that either both parties should have representation, or neither.

Professor S. Macaulay of Wisconsin University's School of Law, argues against the use of lawyers in the resolution of consumer disputes in an article published in 1980, entitled Lawyers and Consumer Protection Laws. The author points out that it is not in the lawyer's interest to end the matter as quickly as possible, nor are most consumer claims worth the expense of professional representation.

Finally, although OMVAP does not appear to encourage manufacturers' use of legally qualified representatives by manufacturers, the use of personnel officers may achieve the same "repeat player" advantage, where such officers

develop significant experience and expertise in OMVAP hearings. It is just this experience which is avoided under the Australian requirements of both personal knowledge and consent.

x) The arbitration hearing

1) Initiation

The proceedings would be initiated by the completion of a standard form by the complainant, aided by the mediation officer, setting out the names and addresses of both parties to the dispute, the nature of the claim and the award sought. The nominal filing fee would form part of the claim. Any party, other than the respondent, who the claimant (or mediation officer) feels may be an "interested" party, should be designated.

The claim would then be sent to the committee, whose responsibility it would be to notify the respondent and other interested parties. The committee, within a limited number of days (possibly 10), would arrange for the list of arbitrators to be sent to the disputants. Included would be notice of the time period they are allowed to make their choice, and the fact that if they are unable to make a choice, the committee will do it for them.

As soon as the arbitrator was chosen, the committee would be given a limited amount of time (possibly 10 days), in which to arrange for the date, time and place of the hearing. At no time would the hearing take place more than 30 days after the complainant had first informed the committee that he or she wanted arbitration.

The claimant would be able withdraw the claim at any time up until the date set for the hearing. This is important in order to encourage settlement by the parties.

The hearing, itself, should commence with both parties being clearly informed about the binding nature of the award, the impossibility of appeal, the procedure which shall be followed, and so on. It is the considered opinion of OMVAP, among other arbitration programs, that the meaning of arbitration (i.e. binding) and the procedure to be followed in the hearing can never be reiterated too often. Further, this gives the parties one more chance to stop the proceeding and settle their differences. The Better Business Bureau arbitration proceeding always recesses for 20 minutes after the arbitrator explains the procedure to be used, in order to give the parties one

cases, and it is recommended that this measure be included in the procedure of the proposed consumer complaints board.

2) Binding nature

Once the hearing begins, the parties would be bound by its findings. Except for the general requirement that all testimony be made on oath (research in both Australia and America demonstrates that parties tend to be more careful with the truth when on oath), no other evidentiary rules are recommended.

3) Document-only hearings

L. Roine, in the Consumer Council study previously mentioned, recommended the use of "documents-only" arbitration proceedings for consumer cases involving small amounts. He is not alone in this thinking. A number of jurisdictions promote the use of affidavit evidence on arbitration hearings. It is considered a cost-effective method of dealing with matters involving disputants who are geographically a great distance apart.

Another suggestion may be to promote the use of "conference calls" through which testimony is made available to the arbitrator. Such calls are already approved in certain judicial proceedings (refer to the Rules of Civil Procedure) and have occurred, on occasion, in OLRB arbitration hearings. They would, where considered "fair" by the arbitrator, do a great deal to cut both costs and time delays in the proceedings.

4) Third parties

Third parties, with a demonstrable "interest" in the proceeding, should be allowed to present evidence subject to the arbitrator's discretion. This is currently the case in the Australian tribunals and best promotes the concerns of all parties involved. Any party appearing before the hearing would be bound by the arbitrator's award.

5) Class actions

Class actions are not considered viable in the proposed arbitration system. First, the procedures and administrative requirements of such an action are too complex for inclusion into such a system, which is essentially desired because of its simplicity. Further, the class action is not suitable for a system which is made available primarily for consumer complaints which depend on the facts of an individual case and do not present a collective problem.

complaints which depend on the facts of an individual case and do not present a collective problem.

xi) The Award

In an Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Washington Federal Justice Centre, 1981), it was found that over 60% of arbitration awards were nullified, due to an application by one of the parties for a new trial. However, as a true alternative to court proceedings, arbitration is not appealable, but binding on the parties. It is, therefore, a necessary part of this proposal that the arbitrator's award be final.

The limits of the arbitrator's power over the award need to be carefully defined by statute. This is required in order to avoid any conflict, real or perceived, with Section 96 of the Constitution Act, 1867.

The entire issue of the constitutional validity of any proposed arbitration system is of fundamental concern. It cannot be adequately addressed, however, until a specific program is approved, in principle, by the Ministry. At this point careful legal analysis by constitutional experts can occur, based on the specific details of the proposal. Reference should be made to Ontario's Farm Products Grades and Sales Act, mentioned previously, which deems that the agreement to arbitrate is included in every contract arising under its jurisdiction. Similarly, a "deeming" provision would cover all consumer transactions occurring under the proposed Consumer Protection Code.

It is recommended that the Consumer Complaints board arbitrator be empowered to:

1) dismiss the claim for want of jurisdiction (i.e. where issue in dispute does not pertain to violation of Ministry legislation, or the award sought is not within the jurisdiction of board);

2) require the respondent to pay the claimant any amount within the arbitrator's jurisdiction (i.e. $10,000); the amount should not include general damages compensation;

3) order specific performance by the respondent;

4) order rescission of the contract made by the parties;

5) order costs limited in amount to the costs of the proceeding (i.e. the arbitrator's fee set by a tariff established by the committee, travel expenses, and expense of renting the forum) where:

   a) the proceeding is determined to have been

initiated unreasonably, against the mediator's recommendation and to no further gain than mediation itself would have allowed (this award allows for penalization of the claimant); or

b) the award is based on the factual finding by the arbitrator that the respondent did, in fact, violate the legislative protection (this award allows for penalization of the respondent).

Other than these five specified areas, it is recommended that the legislation specifically prohibit any other award.

The arbitrator's award should be required to include point-form reasons. This requirement is considered necessary so that the parties are informed as to why the adjudicator decided in the manner he or she did. It is also important in terms of the possibility of judicial review. At the same time, however, in order to keep costs down, long and detailed reasons are not justifiable.

Again, in order to ensure time efficiency is met, a limited time-period should be specified within which the written award must be delivered to the parties and the committee. The committee, in turn, would be responsible for ensuring the award is entered into, and forms part of the Ministry's public record. Moreover, awards should form part of the committee's annual report to the Minister.

xii) Enforcement

If either party has not received the benefits of the award, or, if a specific action was ordered but has not been commenced in a reasonable manner, within 21 days of the making of the award, the order would be filed in the Small Claims Court and, as such, becomes enforceable as any other court order.

18. Business Codes of Ethics

BUSINESS CODES OF ETHICS

BACKGROUND

Ethical conduct can be seen as the cornerstone of solid consumer protection and fair business dealing. The need for ethical conduct is, therefore, thought to be the rationale for government to intervene in the marketplace and to create laws which protect and establish the playing rules.

On researching a variety of codes issued by industry associations in the past, it can be seen that they were initiated for a variety of reasons, both altruistic and self-serving. The more altruistic examples set clear standards of ethical behaviour and provide effective consumer protection. The more self-serving examples appear to have been adopted either in response to the threat of government regulation, or established as a means of restricting membership to an exclusive few, and some appear to have been adopted as little more than window dressing.

Codes currently vary in strength and effectiveness. However, taken overall, they clearly represent more than a passing attempt to improve marketplace ethics and standards. They deserve to be given some degree of recognition and encouragement, if not some form of statutory recognition.

GENERAL PROBLEM AREAS

1) The current level of public concern regarding business ethics generally suggests stronger ethical requirements are necessary.

2) The specific public concerns regarding the issues of quality of products and services, sales and promotional techniques and advertising standards suggest that government should introduce more detailed standards in these areas.

3) In Canada, there is presently no recognition given in legislation or by legislators to codes of ethics developed by associations.

4) Standards for the ethical conduct of association members could be utilized by the director and the registrars within the Business Practices Division of the Ministry in making specific decisions on the renewal of registration and licensing of industry members.

5) Standards for the level of training and experience of new entrants into a registered industry are often dealt with by special training and accreditation courses and addressed by

specific decisions on the renewal of registration and licensing of industry members.

5) Standards for the level of training and experience of new entrants into a registered industry are often dealt with by special training and accreditation courses and addressed by their codes. Therefore, by recognizing an industry code, the registrars would be better able to set minimum entry standards for registration and licensing.

SPECIFIC ISSUES

1) Issues of quality, advertising and promotion are abstract and subjective concepts and, therefore, difficult and costly for government to regulate, whereas industry codes can be detailed and specific on such issues.

2) Legislation tends to set more general standards, written in generic terms, whereas industry codes can be detailed, even specific on such issues.

3) The Ministry has long encouraged the notion of industry self-regulation, and statutory recognition of their codes of ethics would be an important step toward self-regulation.

4) Should the Ministry consider encouraging industry self-regulation at this point?

5) Should the Ministry impose sanctions for breaches of codes?

6) How should non-members of an association be treated?

PROPOSED DIRECTION

In considering a direction to propose, the advantages and disadvantages inherent in association codes of ethics were examined. These are:

Advantages:

- Specific standards of honesty and fair dealing can be set as they apply to a specific industry, whereas legislation could set only very generic standards;
- Improved standards throughout an industry would be developed, as the members of the association are required to comply and non-members are often influenced by overall industry behaviour and practices;

- The public trust in an industry or profession would be maintained, and possibly enhanced;

- The level of competence of an industry would be improved through standard-setting, as well as through educational and accreditation programs, which are often referred to in codes;

- Adaptation to changing trends and marketplace practices is relatively easy with revisions to codes of ethics, whereas it is more difficult to implement changes to government regulations;

- The degree of government intervention in the marketplace would be minimized.

Disadvantages

- Not all codes are of equal status or strength, with the result that standards are not even throughout the marketplace;

- There is currently no legal or legislative requirement for such codes. Therefore, there is no effective way in which they can be enforced, either among members or non-members of an association;

- There is currently no means for the association to take action against members for non-compliance with the codes other than expelling them from membership;

- Currently, codes are not well-known by either consumers or the courts; therefore, they are overlooked as evidence in settling a consumer dispute or as a guide in determining a judgment;

- Codes can be overly self-serving, establishing restrictive membership criteria, thereby unfairly excluding portions of an industry.

Discussion of Possible Directions

By conferring some form of statutory recognition on codes of ethics, it is believed that most of the disadvantages noted would be eliminated, especially if such codes were required to meet a set of generic standards or guidelines, and were well publicized. It is, therefore, recommended that the Ministry consider such statutory recognition of codes of ethics. It is evident that such recognition would be well received by those industries who already have set an effective code of ethics. Moreover, the Consumers' Association of Canada would also welcome some form of recognition of such codes. In their brief to the Legislative Review Project, they recommended such a move, stating:-

"...guidelines (for codes of ethics) should appear in a schedule to the foundation bill...and thus could be used when a dispute arose."

The CAC brief included a proposed set of ten guidelines for inclusion in any code of ethics. These are outlined, as follows, to show how a legislated generic set of standards, backed by codes of ethics in specific industries, and a legislated set of intervention mechanisms, could work together to improve the ethical standards of the marketplace.

1) Adhere to federal, provincial and municipal laws;

2) Tell consumers what it costs for goods and services;

3) Give consumers the goods or services for which they paid;

4) Identify goods and services accurately, and be descriptive without being deceptive or misleading;

5) Be truthful in advertising;

6) If goods or services have a manufacturers' or retailers' warranty, communicate to consumers that you are selling a warranty with the goods or services;

7) If something has to be signed, e.g. contract, warranty. etc., then give the consumer the time to read and understand what he/she is signing;

8) Have policies on such important issues as:

   - o refunds and exchanges;
   - o deposits;
   - o layaways;
   - o methods of payment;
   - o warranties.

   Communicate these policies to consumers;

9) Train employees to be aware of policies. The employer should be responsible for producing a procedures manual or statement which outlines to employees the ethics of the business establishment;

10) Be prepared to make adjustments in one's behaviour in dealing with vulnerable consumers.

A second recommendation is that the Ministry establish similar standard guidelines for codes of ethics, and assist associations in drafting or redrafting their codes.

The greatest problem to ensuring compliance with such codes would be with the non-members of an association. To resolve

would be with the non-members of an association. To resolve this problem, a number of alternatives were considered. For instance:

- Penalties for non-compliance to an accepted industry code could be greater for non-members than for members. This was rejected, as it might by inference seem to suggest that government was forcing companies to join an industry association;

- State in the foundation bill or regulations that, for the purposes of enforcing these guidelines for codes of ethics, all members of an industry group or profession would be required to adhere to the code of ethics, whether or not they were members of the association;

- Establish the concept of industry councils or federations, to which all organizations and representatives are considered members. The councils' role would be to assist the Ministry in monitoring compliance with the codes. Such councils could have an overseeing body or board, comprised of consumer interest groups, legal and academic practitioners in the specific area of expertise, and a number of industry representatives;

- Make the Ministry responsible for overseeing compliance with their codes of ethics through an Office of Fair Trading similar to the United Kingdom.

Although one or more of these alternatives could be workable, it is thought that the industry council is the most practical approach for the larger, homogenous industry associations and would be the most cost effective and publicly acceptable. In smaller industries, a council would not be as effective. However, it is felt that the Ministry could work with these groups to develop codes that would meet acceptable standards.

Summary of Proposed Direction

1) The Ministry should consider introducing statutory recognition of industry codes of ethics in the regulations to the new Consumer Protection code, in the form of general guidelines of what such codes should address.

2) Such guidelines and the specific codes of ethics should be well publicized, including being posted or exhibited where the goods or services are sold.

3) The guidelines should be similar to those proposed by the Consumers' Association of Canada (Ontario) in their brief to the Legislative Review Project.

4) The Ministry should ensure compliance with such codes through the formation of industry councils or federations in the larger, more homogeneous industries, such as real estate and travel. Such councils could be legislated in the regulations to the Consumer Protection Code and/or the regulations to an industry-specific act.

5) Smaller, less homogeneous industries could be encouraged to develop acceptable codes and standards with the assistance of Ministry staff.

19. Trade Practices (The Business Practices Act)

TRADE PRACTICES (THE BUSINESS PRACTICES ACT)

BACKGROUND

The Business Practices Act sets out a "laundry list" of unfair practices, broken down between false, misleading, or deceptive consumer representations, and "unconscionable" consumer representations.

Included in the act are fourteen examples of unfair practices, and eight examples of unconscionable practices.

If a consumer enters into an agreement after a representation that included an unfair practice and that induced the consumer to ener into the deal, the agreement may be rescinded within six months. To do that, the consumer simply states that intention in writing to each of the parties to the agreement.

GENERAL PROBLEM AREAS

1) The wording of Section 2 of the Business Practices Act, which deems certain types of consumer transactions to be unfair or unconscionable, is not easy to understand or apply.

2) The list of practices in the Business Practices Act is often interpreted as to preclude other misrepresentations from being covered.

3) No general definitions or categories are provided to lead to an understanding of why the practice is deemed to be unfair, deceptive, or unconscionable.

4) The Business Practices Act is limited with respect to the subject-matter and the persons that it covers.

SPECIFIC ISSUES

1) Scope of Prohibited Acts or Practices

   a) Standard of deception - whether the standard of deception for unfair trade practices should be extended to include conduct which has the effect of deceiving or misleading a consumer;

   b) Post-contractual practices - whether the revised trade practices legislation should prohibit unfair trade practices which occur before, during, and after the consumer transaction;

   c) Necessity of contract - whether the revised trade practices legislation should provide for consumer-initiated private remedies without the necessity of there

being a completed consumer transaction;

d) Non-disclosure - whether the revised trade practices legislation should include "non-disclosure of a material fact" under the general heading of unfair trade practices.

2) Persons Covered by the Act

a) Persons engaged in commercial activities, dual purpose activities and first time business opportunities - whether the Business Practices Act should cover purchases by businesses, purchases which can be used for both family and business purposes, and inexperienced purchasers of business franchises;

b) Private transactions - whether the trade practices legislation should be restricted to "business-to-consumer" transactions, as is the case with most consumer protection legislation in North America, or whether it should apply equally to everyone who engages in consumer transactions;

c) Privity of contract - the doctrine of privity of contract requires that parties be in a direct contractual relationship before liability arises for breach of contract.

The following examples illustrate the difference between vertical and horizontal privity of contract:

Vertical privity of contract - a case in which a purchasing consumer has a problem with a product, in that it does not meet the claims set out by the company producing it. The consumer returns the product to the retailer who does not honour the company's claim. Subsequently, the consumer takes the product to the manufacturer who states that the consumer has the contract with retailer and not with it. There is no contract between the manufacturer and the consumer, and, therefore, no right of action by the consumer against the manufacturer;

Horizontal privity of contract - a case in which the consumer receives a product as a gift. There is no contract between the receiver of the gift and the store, and, therefore, no right of action by the receiver of the gift against the store.

A policy decision needs to be made as to whether the doctrines of vertical and horizontal privity of contract should specifically be abolished in the new trade practices section of the legislation;

d) Assignment - whether to specifically state in the new Consumer Protection Code that assignees are responsible

3) Subject-Matter of a Consumer Transaction

Should the revised trade practices legislation cover everything that is the subject of a consumer transaction? That would include such areas as the services of professionals, real property, money, securities, insurance, and other intangible personal property.

a) Services - whether the present definition of "services" in the Business Practices Act, which is perceived to lack clarity and to be too restrictive in nature, should be expanded to cover real estate agents, as well as all professionals, including those who are self-governing;

b) Property - whether the Business Practices Act should be revised to include real property, intangible personal property, and mixed property.

4) Focus of Unfair Trade Practices Legislation

Should the focus of the revised legislation be the "consumer transaction" as opposed to the "consumer representation"?

5) Unfair Trade Practices

a) Approach - whether the revised legislation should be generally worded, whether it should provide an exhaustive list of prohibited practices, or whether it should provide a general prohibition against unfair trade practices followed by a non-exhaustive list of prohibited acts or practices;

b) Types of unfair trade practices - whether lists of misrepresentations and unconscionable trade practices should continue to be provided in the revised legislation.

6) Prohibited Practices

What specific prohibited practices should be included in the revised legislation?

PROPOSED DIRECTION

1) Unfair Trade Practices

The revised legislation should prohibit unfair trade practices in general, and the term "unfair trade practices" should be defined to include:

a) Misrepresentations;
b) Unconscionable acts or practices;
c) Any contravention of the Consumer Protection Code or its regulations.

"Misrepresentations" and "unconscionability" should only be defined generally in the legislation, leaving specific practices to be addressed in industry regulations.

2) Focus of Unfair Trade Practices Legislation

The focus of the revised trade practices legislation should be the consumer transaction.

3) Scope of Prohibited Acts or Practices

a) Standard of deception - the standard of deception for the legislation should include conduct which has the effect of deceiving or misleading a consumer. The "capacity to deceive" standard should be limited in its application to conduct upon which a consumer can reasonably be expected to rely. It is further recommended that the general impression of a statement, conduct, or representation be taken into account when determining whether or not it constitutes an unfair trade practice.

b) Post-contractual practices - the revised trade practices legislation should prohibit unfair trade practices which occur before, during, or after a consumer transaction.

Civil remedies should be made available to victims of unfair practices which occur after an agreement has been made.

c) Completed transaction - provision should be made for consumer-initiated private remedies, notwithstanding the fact that the consumer transaction is not completed.

d) Non-disclosure - the revised legislation should include "non-disclosure of a material fact" under the general heading of unfair trade practices.

4) Persons Covered by the Act

a) Private transactions - application to one-time consumer transactions between private individuals (consumer-to-consumer transactions) should continue.

b) Privity of contract - vertical and horizontal privity of contract should be expressly abolished in the revised trade practices legislation.

c) Assignment - the legislation should specifically include successors and assignees.

5) Subject-Matter of a Consumer Transaction

The Ministry of Consumer and Commercial Relations should set up a working group to consult with other Ministries which would be affected by the recommendations with respect to trade

practices.

a) Services - The revised legislation should cover all services including professional services.

b) Property

i) Real property

Real property transactions should be covered by the revised trade practices legislation.

ii) Personal property

The revised trade practices legislation should cover chattels personal - that is, both tangible personal property, and intangible personal property (such as insurance, securities, money and credit).

Chattels real (leasehold property, such as mobile home lots, and apartmens) should also be covered by the legislation.

6) Structure of the Legislation

For purposes of review by the Ministry and by legislative counsel, the previous recommendations are set out in a possible legislative form, as follows:

a) An unfair trade practice in relation to a consumer transaction includes:

1) Any act or omission, including non-disclosure, of any kind or by any means in relation to a material fact, which has the effect or might reasonably have the effect, of deceiving or misleading a consumer;

2) Any undue influence or pressure, oppressive terms or conditions in an agreement, or the entering into a consumer transaction by a person with whom the consumer is dealing where that person knows or ought to know that the consumer is unable to understand the terms or conditions of the transaction;

3) Any contravention of the Consumer Protection Code or its regulations.

b) The appropriate authority may further define unfair trade practices in industry-specific regulations.

c) An unfair trade practice by a person in relation to a consumer transaction may occur before, during or after the consumer transaction, notwithstanding the fact that the consumer transaction is not completed or no consumer has

suffered loss or damage.

d) In determining whether or not a representation constitutes an unfair trade practice, the court or other fact-finder may take into account the general impression that the representation gives and the literal meaning of the terms used therein as well as the standards of conduct in the particular industry.

e) 1. No person shall engage in, acquiesce in, counsel, promote or otherwise participate in, either directly or indirectly, an unfair trade practice in relation to a consumer transaction;

2. A person who performs one act referred to in Section 1 shall be deemed to be engaging in an unfair trade practice.

7) Definitions

Consumer Transaction - "The advertising, solicitation, promotion, offering for sale, sale lease, rental, assignment, award by chance or other transfer, disposition or supply of any service, professional or otherwise, or of any kind of real, personal or mixed property, whether tangible or intangible, to a person for purposes that are primarily personal, family or household and shall include transactions involving the lending of money, the extension of credit, and the purchase of securities or insurance or any act in support or furtherance of the above."

Person - "An individual, firm, corporation, partnership, cooperative, association or any other organization, legal entity or group of individuals however organized and the successor to and assignee of any rights or obligations of a person."

Property and Services include "any thing or service that is subject of a consumer transaction."

20. Advertising

ADVERTISING

BACKGROUND

Advertising is a major part of the modern marketplace. Whether it is testimonial, institutional, differential or advocacy advertising, it attempts to create consumer awareness of the product, service or position which is the subject of the presentation.

Although the words "advertising" and "advertisement" are traditionally defined as making generally known or giving notice by public announcement, modern technology is enabling advertisers to target consumers individually. Using computerized aids, direct mail advertising can incorporate a specific consumer's name into promotional text, and automated telephone solicitation, combined with voice synthesization, can address the call recipient by name. Therefore, advertising, which was once general and impersonal, is endeavouring to become specific and personalized.

During the last five years, net advertising revenues in Canada have grown at an average rate of 9.05% annually, culminating in a nation-wide total of $6,669,600,000 in 1986.

Advertising is believed by many to have a profound impact on the purchasing decisions of consumers, and it leads to certain expectations as to the nature and quality of the product or service to be acquired. Failure to meet these expectations often leads to consumer complaints. Consequently, government is becoming increasingly concerned with advertisements, most particularly with their impact upon a fair marketplace.

GENERAL PROBLEM AREAS

1) Coordination between Provincial and Federal Governments

Under the Canadian constitution, there is no specific assignment of authority over advertising to either the federal or provincial government. The generic category in Section 91 (2), "Regulation of Trade and Commerce," provides some basis for federal jurisdiction in the regulation of advertising. On the provincial side, advertising is covered by the powers regarding "Property and Civil Rights in the Province" (Section 91 (13)) and "Generally all Matters of a merely local or private Nature in the Province" (Section 91 (16)).

It would appear that neither the provincial nor the federal government has sole jurisdiction over the control of advertising and that, to the extent that each government has authority under its constitutional powers, both may legislate in this area.

The confusion which exists in the minds of consumers with respect to jurisdictional responsibility was evidenced from the review of a sample of Ministry complaint files for 1986, undertaken as a part of this review project.

In their review of a sample of 1,510 Ministry complaint files for 1986, project researchers found that approximately 3% of these files concerned advertising. These complaints ranged from misrepresentation regarding automobile financing to the product advertised at special prices being out of stock; complaints were most numerous in the Toronto area.

Research done on this sampling indicated that advertising complaints were almost evenly divided between the "false" and "misleading" categories. In the misleading category, several complaints dealt with advertisements (primarily newspaper advertisements) which, upon first glance, gave one impression, but when the fine print was read, showed a different intent.

The fact that a consumer would complain to this Ministry about a "general impression" issue (which falls under the Competition Act), indicates one of the major problems with the division of responsibility in consumer protection matters - the public is unsure which government has jurisdiction. The complaint files indicate that sometimes even government officials are less than certain. Project researchers found that "in a couple of instances, complainants regarding advertising had been referred from the federal to the provincial government, and vice versa, more than once until an agreement on jurisdiction had been reached."

It would seem that co-operation between governments is not so much a problem as is co-ordination of effort.

2) Lack of Information

There are an increasing number of consumers who view advertising as not supplying useful information. The Ministry undertook "Ontario Consumer Issues" surveys in 1978, 1980 and 1983, from which it may be noted that 32% of respondents in 1978, and 42% in both 1980 and 1983, perceived advertising as not supplying useful information.

The need for information is particularly high in certain specific product areas, such as travel. Respondents to the Ministry survey were particularly dissatisfied with travel agents due to incomplete information given in advertising or in information brochures. Although consumers surveyed by the Ministry over the period 1978-1983 tended to view product information as improving during that time, they still believed that further improvement was possible with respect to information disclosure in advertising.

3) Unfair Practices

Whereas lack of information is of some concern to consumers,

survey responses indicate that consumers are far more concerned with unfair practices in advertising.

Approximately two-thirds (66%) of respondents in both 1980 and 1983 (up from 60% in 1978) expressed their concern about the failure of many companies to live up to claims made in their advertising. More specifically, there has been a growing number of complaints about the quality of a product not being as advertised (23% in 1978, 34% in 1980, and 38% in 1983). Other complaints related to misrepresentation of product or service generally, durability not being as claimed, and advertised product not being available.

As part of the recent review team's Consumer Opinion Survey, misinformation or product misrepresentation was the third largest (of 15) problems identified; it was the primary complaint in the travel industry.

Most respondents to the Ministry's consumer issues surveys have tended to be rather pessimistic about the possibility of improvement in the area of misleading claims about products. The majority believed that there had not been (68% in 1978, 70% in 1980, and 66% in 1983) and would not be (54% in 1978, 57% in 1980 and 52% in 1983) a change for the better in the area of misleading claims.

4) Perception of the role played by government

Consumers' perception of the role government plays in regulating advertising seems negative. The majority of respondents in the Ministry's surveys of 1978, 1980 and 1983 (62%, 61%, and 69% respectively) could not name any specific laws to protect consumers. Although, in answer to an open-ended question, the highest percentage of respondents in 1983 knew about truth-in-advertising laws, this represented only 9% of the total. In relation to a specific medium (i.e. television), 49% of the survey's respondents believed that advertisers were virtually unregulated in terms of the truthfulness of their advertisements.

SPECIFIC ISSUES

1) Although the current reliance upon and potential for information disclosure by advertising is high (despite a supposed scepticism about claims made), what little information is contained in advertising is seen to be inadequate for the purpose of rational product evaluation. Should disclosure of more information be required, and, if so, what information?

2) Unfair advertising practices continue to be a concern for consumers, who complain that the products advertised often are not available, and not of the quality or durability claimed. Consumers want to be able to rely on claims made in advertising and they want advertisers to live up to the claims

they make. Should advertisers be held responsible for claims that they make?

3) Consumers lack knowledge of what consumer protection law exists to regulate advertising, particularly in relation to truth in advertising, and they do not believe that the government is active enough in this field. Is it necessary to make the consumer more aware of government activity in the area of advertising truthfulness and, if so, how should this be done?

4) There is uncertainty among both consumers and government officials about which sphere of government has jurisdiction in any given case dealing with advertising. The question is - what jurisdiction does the province have and need in this area?

5) Does the province need to legislate a "general impression" test as part of its regulation of advertising to determine whether or not there has been an unfair practice?

6) The language of the legislation is difficult to understand in identifying what provisions apply in the case of different kinds of unfair advertising practices. How can the provisions be simplified?

7) The adequacy of the present approach (including resources and methods) taken by the Ministry to regulate advertising practices does not appear to be effective in preventing contravention of existing legislation. Is this a problem of legislative definition or a problem of enforcement?

8) The entry of advertising delivery systems into areas of new technology (e.g. telephone solicitations and electronic mail advertising) leave doubt as to whether the present approach to defining unfair advertising practices is sufficient to deal with new developments.

9) Although the Business Practices Act prohibits representations which fail to state a material fact if such failure deceives or tends to deceive, it is sometimes difficult to determine what is material. For the purpose of clarity, should disclosure of specific facts be required in advertising?

10) Should each industry-specific registrar have the specific power, now vested in the registrar for the Consumer Protection Act, to deal with failure to conform to credit disclosure requirements when this occurs in relation to the specific industry?

11) Should the disclosure requirements and sanctions regarding credit advertising apply to all those who either engage in or benefit from such advertising?

12) Should the administrative process in issuing a cease and desist order be modified to allow for more timely action?

13) Should there be a program instituted to monitor advertisements in order to deal more quickly with the problems which arise?

14) How can the Ministry be effective against advertisers who operate outside provincial boundaries?

15) Should the "knowingly" component be removed so that the offence of contravening the prohibition against unfair advertising practices becomes one of strict liability?

16) Should a general prohibition against unfair advertising practices be legislated, or should there be an expansion of the list of specific prohibited practices in order to deal with matters not currently under provincial legislation?

17) Should all those in the chain of supply who either advertise or benefit from the use of the advertisements of others be held accountable for whatever representations are made therein?

18) Should the Ministry set out guidelines for business to follow when it advertises?

19) Should advertisers be allowed to advertise the fact that they are registered under one or more of the Ministry's registration schemes?

20) Given the relatively low number of complaints handled by private intermediaries, is there a need for further government intervention?

21) Should the Ministry formally establish a program to inform business of interpretations, both administrative and judicial, on the application of consumer protection law?

22) What standard of protection should apply, a "reasonable man" test or some other standard?

PROPOSED DIRECTION

1) The new legislation should be structured to focus on the claim, etc., made, regardless of whether or not an advertisement is involved, so that the approach to regulation is simple and consistent.

2) The legislation should prohibit acts or practices which, regardless of the advertiser's intention, or the means by which the claim is made, have the effect of misleading or deceiving consumers.

3) Regulation of claims should be applicable regardless of

whether the claim was made before, during or after the consumer transaction and whether or not any such transaction was actually completed.

4) The standard of protection, in the case of claims made about a product or service, should be one of reasonable reliance by an average member of the public.

5) Advertising persuasion should be controlled through:

a) the regulation-making power to make specific techniques or practices, which are demonstrably detrimental to consumers, fall within the general prohibition; and

b) granting discretion to dispute-resolvers to consider the general impression conveyed by the advertisement, in determining whether it is unfair to the point of contravening the general prohibition.

6) Advertising concerning any long-term financial obligations which may be acquired by consumers should be subject to disclosure requirements.

7) Where there exist financial obligations which form part of the long-term financial obligation agreement, but do not have to be disclosed, the fact of their existence should be required to be stated in the advertisement, with reference to a document which sets them out in detail. This document should then be delivered to the consumer prior to entering into the long-term financial obligation agreement.

8) An advertiser who states in an advertisement that specific terms, conditions or costs of long-term financial obligations may be available in relation to a sale, lease, or other acquisition by the consumer of goods or services (including credit or money) from the advertiser, should be prohibited from substituting any other terms, conditions or costs which are less favourable to the consumer, even if the financial services advertised were to be offered by a third party and are no longer available upon those terms, conditions or costs.

9) The defences of due diligence and timely correction of genuine error should be available to anyone who participates in the creation, production, printing, publication, distribution, broadcast or other dissemination of a statement or claim in contravention of the Consumer Protection Code, and who has no financial interest, either directly or indirectly, in the consumer transaction.

10) Courts or other dispute-resolvers should be given the discretion to look at and apply, where appropriate, industry advertising standards to help determine whether a representation or other aspect of an advertisement constitutes an unfair trade practice.

11) The administrative authority empowered to issue cease and desist orders should be further empowered to establish and publish guidelines to assist business in complying with the law. It should also have the power to issue a notice of non-compliance, when the situation is not serious enough to require an immediate cease and desist order.

12) The cease and desist order-making power should be stated in generic form and should be applicable to all claims, statements, representations, etc., whether they are conveyed to consumers in advertisements or in some other form.

13) The making of a claim of a quantitative or comparative fact relating to the quality and durability of goods or services, should be regarded as an unfair trade practice, unless there has been an adequate and proper test prior to the making of the claim, the results of which are sufficient to support that claim.

There should be disclosure of any artificial means used to enhance, simulate, create, or in any other way give the impression that a representation, appearance, function, feature, or performance of goods or services is real when it is not.

14) The appropriate administrative authority should have the power to require at any time that an advertiser submit for approval a complete and accurate copy of any advertisement or similar material prior to its use, if the authority is of the opinion that the advertiser has been, is, or will be in contravention of the Consumer Protection Code or regulations.

15) A claim made in relation to goods and services, which are the subject of a consumer transaction, should be regarded as an express warranty which is binding on the person who makes it.

16) If the appropriate authority finds that an advertiser has contravened the code, the authority should have the power to order that the advertiser publish the fact of that finding, or advertise in accordance with the terms and conditions ordered by the authority, or both.

17) An advertiser should be required to list his or her name, address (not just P.O. box number) and the registration number in any advertisement he or she has published. Also, when the person who is to engage in the consumer transaction is someone other than the advertiser, the advertiser should include in the advertisement the same information with respect to that person.

18) With regard to the information required to be disclosed in advertising, such information should be presented in accordance with the following criteria:

a) In the case of material which is presented in print or

other written form, the size and clarity of the print, etc., shall be easily readable;

b) In the case of material which is broadcast or otherwise transmitted orally or visually, the information shall be transmitted so that the information is displayed or spoken at a reasonable rate or for a reasonable length of time;

c) In all cases, the language used shall be plain and simple, easily understandable to the average consumer.

21. Warranties and Product Liability

WARRANTIES AND PRODUCT LIABILITY

BACKGROUND

A warranty may be defined as an assurance or promise regarding the quality of goods and the responsibilities of the warrantor, whether seller or manufacturer, in the case of product failure. An implied warranty is one which exists by virtue of the law; an express warranty is one which the warrantor offers, either orally, in writing, or by other communication, such as an advertisement.

As modern consumer products become increasingly complex, the average consumer becomes correspondingly less capable of assessing the quality, durability and suitability of goods. Frequently, packaging and other factors will add to the difficulties experienced by consumers in inspecting and selecting goods. A warranty provides the consumer with a measure of protection against the risk of unknowingly purchasing a defective product.

GENERAL PROBLEM AREAS

1) Minimal and Piecemeal Regulation

Consumer product warranties in Ontario are presently subject to minimal and piecemeal regulation under the Sale of Goods Act and the Consumer Protection Act.

2) Misleading and Unfair Situations

As warranties become increasingly common, and as consumer products become increasingly complex, the opportunities for misleading and unfair situations also increase. According to Professor E.P. Belobaba in a 1983 study on consumer product warranty reform, few consumers are aware that with or without express warranties, every new product comes with certain non-excludable statutory implied warranties of fitness and merchantability. Most consumers believe that express warranties are merely a means of limiting the supplier's obligation, and are the only basis for product quality or supplier performance evaluation.

Consequently, warranties have actually become a source of confusion rather than protection, with the consumer being at an extreme disadvantage due to lack of knowledge.

3) Specific Problems noted by Empirical Studies

Empirical studies of consumer product warranties and service contracts in both Canada and the United States have identified problems pertaining to:

- The form of written warranties - printed warranties are usually complicated and difficult to understand;

- Lack of knowledge on the part of both consumers and suppliers about consumers' legal rights;

- Supplier indifference;

- Unavailability of spare parts and service providers;

- Unfair warranty terms.

4) Consumer Dissatisfaction

As mentioned before, the Ministry of Consumer and Commercial Relations conducted broad-based surveys of consumer attitudes and experiences in 1978, 1980 and 1983. Data from those surveys indicate that 56-64% of consumers who responded were extremely or moderately concerned about problems with warranties and guarantees. In addition, in the 1983 survey, 58% of car owners stated that they were dissatisfied with the warranty coverage on their vehicles, and 57% reported dissatisfaction with the availability of dealers to do repairs under warranties.

5) Enforcement of Warranty Coverage

The major problem with warranties, as evidenced from the 1987 Consumer Opinion Survey, was enforcement of a product warranty in the home improvements area, as well as with respect to automobiles. A total of 56% of consumers were most dissatisfied with the ability to enforce warranty coverage on home improvement problems, and 43% were dissatisfied with enforcement of automobile warranties.

6) Concern of CAC

Warranties continue to be a major consumer concern to the Consumers' Association of Canada (Ontario), as noted in its brief to the Legislative Review Project in June 1987. The following is an extract from the brief, which shows the extent of the organization's concern:

"We have been interested in the subject of warranties for at least fifteen years. In 1973, several of our local associations as well as the provincial organization presented briefs in response to the Green Paper on Consumer Warranties in Ontario. In 1976, another brief commented on a proposed act to provide warranties in the sale of consumer products. We are disappointed that the legislation was never enacted."

7) Application to Services

In past years, the concept of warranties was applied only to goods. However, in view of the increasing importance of the sale of services in the marketplace, there is a need to

clarify the fact that the concept of warranties should extend to services, through specific legislation governing warranties. During warranty discussions by the Minister's Advisory Committee, there seemed to be consensus to the effect that the proposed warranty legislation should apply to services. This was also recommended by the Regional Consumer Advisory Panels.

8) Product Liability

A 1979 report by the Ontario Law Reform Commission emphasized the need for a product liability law in the province:

> "The case for reform of the law of products liability does not rest on the assertion that there is a large number of cases in which persons injured by defective products wrongly go uncompensated...(but) rather, that the present law contains serious anomalies. If anomalies and irrationalities in the structure of the law cause injustice in even a comparatively small number of cases, there is an argument for reforming the law."

An individual who has suffered an injury or other loss which may be due to a defective or dangerous consumer product may initiate an action claiming negligence, breach of warranty (implied or express), strict liability, fraud or breach of any number of federal safety statutes. Out of these five options, negligence and breach of implied warranties are the most common bases for legal action.

English and Canadian common law has established a duty on the part of manufacturers to take reasonable care in the preparation of products for sale. The plaintiff in a negligence action is limited to suing the manufacturer; retailers and other members of the supply chain are not easily caught in negligence actions. There is a burden on the plaintiff to prove negligence, or failure to take reasonable care, by the manufacturer; simply demonstrating that the product was defective or dangerous when it left the manufacturer's hands may be insufficient.

With respect to actions for breach of implied warranties, the Ontario Law Reform Commission noted some basic limitations. Such actions are governed by contractual principles; therefore, only the consumer who purchased the product can proceed and only against the retailer who sold it. Moreover, non-sale and incomplete transactions are not adequately covered.

Actions for strict liability are also limited to contractual relationships. The advantage of strict liability is that it is not necessary to prove negligence. Strict liability is available in the United States, but is not an option in Canada. It should be noted that Canadian safety statutes

However, actions alleging fraud by the manufacturer or retailer in the marketing of a defective or dangerous product are difficult. The option exists more in theory than in practice.

In summary, as the Law Reform Commission noted, the strength of an injured party's claim and the accessibility of compensation for injury and loss under the existing system may depend on such questions as whether the injured party actually bought and paid for the product. Although it may seem that injured parties are regularly and adequately compensated, inequities in the system persist, and reasonable, justified claims still go uncompensated due to technical anomalies.

SPECIFIC ISSUES

1) Who and what should be covered by the legislation?

2) In the area of implied warranties, what should the law oblige suppliers to warrant to the consumer regarding the quality, durability, and other aspects of the goods?

3) In the area of express warranties, who should be responsible, and to what degree, for oral and written statements and promises regarding the goods?

4) "Grey marketing" occurs when a product intended for a foreign market is legally purchased outside of the country, is imported into the country, and then is distributed for sale outside of the authorized dealer network. A decision needs to be made as to whether the law should provide protection for consumers who purchase "grey market" goods, and are unable to enforce a warranty against such goods;

5) Should used and substandard goods be covered by the legislation?

6) Should the law protect consumers in the purchase of services, as well as goods?

7) Should extended service contracts be covered?

8) Should Ontario provide recourse for persons injured by a consumer product?

PROPOSED DIRECTION

The following structural and policy recommendations are made with respect to warranties:

1) STRUCTURAL RECOMMENDATION

It is recommended that the Ministry of Consumer and Commercial Relations introduce foundation legislation respecting consumer

product warranties, similar to the omnibus laws in Saskatchewan and New Brunswick. This foundation law on warranties should likely exist as a section or chapter of the proposed Consumer Protection Code.

It is further recommended that specific product markets in which warranties are particularly problematic (i.e. home improvements and automobiles) be addressed through industry-specific, specially-designed legislation.

2) POLICY RECOMMENDATIONS

CONSUMER:

For the purpose of the product warranties legislation, "consumer" should include all purchasers of consumer products for primarily (but not solely) personal and family uses, and subsequent owners by purchase, gift, inheritance etc.

WARRANTOR:

It is recommended that Ontario's legislation hold retailers and manufacturers jointly and severally responsible for the implied warranties under the legislation.

With respect to additional written warranties, the party identified in the warranty as warrantor is responsible - in practice, usually the manufacturer. However, if the manufacturer does not maintain adequate, accessible service facilities, the retailer should be responsible for the additional written warranty.

The definition of manufacturer includes an importer of a product if the manufacturer does not maintain an office in Canada.

CONSUMER PRODUCT:

A consumer product is a tangible good which is purchased primarily, but not solely, for personal or family use, including goods not usually purchased by consumers. Goods designed to be attached to or installed in any real or personal property are included. Used and substandard products, leased and rent-to-own products and goods, which are supplied in conjunction with a service, are included.

IMPLIED WARRANTIES:

It is recommended that Ontario incorporate the existing implied warranties under the Sale of Goods Act with the additional implied warranties of durability and reasonable access to spare parts and service facilities.

"Merchantability" should be replaced by the term "acceptable quality".

It is also recommended that the following definitions be adopted for Ontario's implied warranties on consumer products:

a) Title, Quiet Possession, and Freedom from Encumbrance

The seller/manufacturer warrants that the title to the consumer product is free, clear and transferrable to the consumer at the time of purchase and that the consumer can possess it without interference.

Manufacturers may be relieved of responsibility for charges, encumbrances, etc., where the facts demonstrate that such charges, encumbrances, etc., were applied by the retailer acting independently.

A consumer may choose to accept or adopt any charges or encumbrances which are attached to a product. Where there is a written agreement which demonstrates that the facts and the implications of the charges or encumbrances were clearly disclosed to the consumer, then the implied warranties of title, quiet possession and freedom from encumbrance will not apply to the particular charge or encumbrance.

b) Conformity to Description/Sample

In a sale by description and/or sample, the product purchased by the consumer will correspond to the description and/or the sample. Where a product is packaged so as to prevent or discourage a full examination by the consumer prior to the purchase, then all labels, tags and advertising materials are considered part of the description of the product.

c) Fitness for Purpose

It is recommended that every consumer product be warranted to be fit for a particular purpose if the seller knows or ought to have known that the product is intended for a particular purpose, unless circumstances show that the consumer did not rely, or that it was unreasonable to rely on the skill or judgment of the seller. The particular purpose may be a common purpose, or an unusual purpose for the product.

It is not necessary to prove actual reliance by the consumer on the skill or judgment of the seller.

d) Acceptable Quality

Every consumer product should be warranted to be of acceptable quality, having regard to the description, price and other circumstances of the sale. Acceptable quality is defined as the characteristics of the product, including but not limited to design, construction, materials, performance, condition and appearance, that the consumer can reasonably expect the product to have. (The term "acceptable quality" includes the concept of merchantability within the meaning of the Sale of Goods Act).

e) Reasonable Durability

It is recommended that every consumer product be warranted to perform for a reasonable time, having regard to the price, description, other circumstances of the sale, and the circumstances under which the product was used.

In assessing the circumstances under which the product was used, consideration shall be given to the uses for which the product is commonly purchased, as well as the particular function for which it was purchased where the warranty of fitness for purpose applies.

f) Availability of Spare Parts and Service Facilities

Where a consumer product normally requires spare replacement parts or servicing, these will be available without undue cost or delay to the consumer for a reasonable period of time following the purchase of the product.

In assessing the period of time which is reasonable for a given product, consideration will be given to the cost, description, circumstances of the sale and expected life of products of that nature.

For the purposes of this section only, "description" may include any written statements which clearly and fully disclose limitations on the availability of spare parts and service facilities.

EXPRESS WARRANTIES:

Ontario should adopt the definitions of "express warranty" and "additional written warranty" used in Saskatchewan's legislation.

It is further recommended that Ontario's legislation require adequate information disclosure in all warranties, including such items as identity and address of the manufacturer and all authorized service providers, procedures for obtaining action under the warranty, and a statement that the retailer from whom the product was purchased is legally responsible for all implied and express warranties.

Ontario's legislation should prohibit clauses which impose undue burdens on the consumer in order to obtain action under the warranty, and should prohibit clauses making the warrantor sole judge of the validity of a claim for action, and also clauses disclaiming statutorily implied warranties. It is further recommended that the parol evidence rule be set aside. This would have the effect of allowing oral evidence.

USED AND SUBSTANDARD GOODS:

The definition of consumer product in the revised legislation should expressly include used and substandard goods. Implied warranties should, therefore, be extended to cover used and substandard goods, and disclaimers of these warranties should be prohibited. In assessing the quality and durability of used and substandard goods, consideration should be given to price, advance disclosure of defects and all other relevant circumstances of the sale.

CONSUMER SERVICES:

It is recommended that Ontario include in its consumer product warranty legislation, two implied warranties respecting the sales of consumer services:an implied warranty of conformity with description/sample/demonstration; and an implied warranty of acceptable quality of performance. Definition of these warranties would be flexible, in order to allow application to the broadest range of present and future consumer services. At the same time, the language of traditional Sale of Goods warranties would be used to evoke existing case law. The warranties could be defined as follows:

a) Conformity with Description/Sample/Demonstration:

The services rendered in a sale of services to a consumer will conform to all descriptions, samples and demonstrations under which the service was purchased. In assessing conformity, consideration will be given to acceptability to reasonable consumers whose expectations were based on the descriptions, samples and demonstrations.

b) Acceptable Quality of Performance

All characteristics of the services performed in a sale of services to a consumer will be of such quality as consumers reasonably expect, having regard to the description, price and other circumstances of the sale, and to the common practices or standards of the trade, profession, occupation or business in which the seller practises.

EXTENDED SERVICE CONTRACTS:

Ontario should include extended service contracts in the information disclosure provisions of its new legislation for additional written warranties. It is further recommended that extended service contracts be required to include clear disclosure of the relationship between the service contract and all implied and express warranties which are included in the purchase price of the goods.

PRODUCT LIABILITY:

It is recommended that the new consumer product warranty legislation for Ontario include provisions for any person who suffers injury or loss from a consumer product to seek compensation from the supplier(s) if the injury or loss was reasonably foreseeable at the time the product was sold.

It is also recommended that Ontario undertake a policy study of product liability as part of the current public and internal discussions of injury and compensation issues. Such a study might be undertaken by an interdisciplinary task group.

Product liability is undoubtedly a complex legal, economic and public policy matter. The key issues in product liability, however, may not be contract law or product warranties, but rather, personal injury and compensation. Long-term reform of Ontario's product liability system may best be approached through broad-based studies of compensation systems, and through specific reviews of safety standards legislation.

22. Refunds and Exchanges

REFUNDS AND EXCHANGES

BACKGROUND

Purchasers of consumer goods in the Ontario marketplace are currently subject to any refund and/or exhange policy practised by the particular business with which they deal. The lack of consistency and lack of information in this area has led to numerous consumer complaints.

Despite some initiatives undertaken by the Ontario Government and business associations in past years to standardize such practices, the disparity continues and significant consumer uncertainty and confusion result.

GENERAL PROBLEM AREAS

1) Lack of Uniformity in Marketplace Practice

There is a lack of uniformity in Ontario with respect to retail business policies regarding refunds or exchanges of merchandise. Existing consumer protection legislation in Ontario is silent on the issue of a merchant's responsibility concerning the refund and exchange policy employed by the business. As a result, individual retailers establish their own policies, which fall anywhere along a spectrum from "NO REFUND OR EXCHANGE", to "GOODS SATISFACTORY OR MONEY REFUNDED". The absence of uniformity in refund and exchange practices among merchants produces a marketplace that is confusing and uncertain to the consumer purchaser.

2) Lack of Disclosure

There is no obligation on the part of the seller to inform purchasers of the specific refund and exchange policy which is practised. The refund and exchange policy of a business may freely differ according not only to the business, but also the good provided, or even the purchaser involved. Some customers, through previous transactions, may gain expectations which are false.

3) Need for Prepayment Protection

A similar lack of information exists regarding the refundability of money paid by a consumer prior to performance of the seller's obligation under the sales transaction. Although the Consumer Protection Act recognizes a need for refund protection to the consumer, the limited protection it provides is not, and never has been enforced.

4) Consumer Confusion

The broad and important impact such business practice

discrepancies have on the consumer is illustrated by a 1983 Ministry survey. When asked to indicate on which subjects they would like to receive information, over 1/3 specifically mentioned "refunds and exchanges".

In addition, one of the key recommendations of the Regional Consumer Advisory Panels was that legislation be provided to improve current refund and exchange policies. The panels noted that all companies and stores needed to do a more thorough job of informing the public of their policies.

The extent of consumer confusion with respect to refund and exchange policies is illustrated by the following statistics:

> The Toronto Consumer Services Bureau of the Ministry, during the 1-week period ending January 12, 1987, received approximately 150 telephone calls, requesting information on refunds and exchanges concerning retail sales alone. In addition, an analysis of complaint files maintained by the Business Practices Division of the Ministry reveals that, out of a total of approximately 80 files closed during the month ending March 31, 1987, 35% concerned consumer requests for assistance involving refund and exchange problems encountered in all areas of sale transactions, including home repairs, motor vehicles, etc.; 10% of these complaints specifically referred to non-refunded deposits.

5) Negative Impact on Business

Consumers who only discover after an attempt for a refund or exchange that an unsuitable purchase will not be exchanged or refunded, often feel that they have been misinformed or misled regarding fundamental terms of the sale. Some will complain, but most will not provide the store with repeat business. As a result, discrepancies in refund and exchange policies are exacting a cost in terms of loss of customer goodwill and customer business.

6) Lack of Harmony with Ministry objectives

The philosophy underlying a proposal to require some standard disclosure regarding refund and exchange practices would complement two of the four underlying principles formulated by the expert panel for the creation of a balanced marketplace and a "level playing field" - reasonable information disclosure and transactional fairness.

SPECIFIC ISSUES

1) Should disclosure of all terms and conditions of the refund and exchange practice of the seller be mandatory?

2) Should a cancellation period be available for deposit/ layaway plans, to ensure the consumer has limited time to comprehend the consequences of payment obligations and the risk involved?

PROPOSED DIRECTION

1) It is recommended that the Ministry consider the incorporation of disclosure legislation regarding refunds and exchanges into the proposed Consumer Protection Code. This recommendation was generally endorsed by the Minister's Advisory Committee.

A number of American states have similar legislation. Enactment of such legislation by Ontario would reflect the disclosure practice already employed by a significant number of the more responsible retailers, thereby ensuring uniformity in the Ontario marketplace. It would place the onus of disclosure on the merchant but avoid a mandatory requirement of a uniform policy on all businesses.

It is proposed that if a retailer of consumer goods neglects to post conspicuous signs informing customers of the refund and exchange policy prior to the sale occuring, the supplier will give those customers a full cash or credit refund or an exchange, at the purchaser's option, provided that goods are returned unused with proof of purchase within one month of sale.

2) The Code should include a comprehensive refund policy, limited in time (one week), for all consumer layaway goods, excluding custom-made, special order or altered goods, with a maximum cancellation fee of 15% of the deposit.

Legislation of this nature would be similar to that in effect in several American states. Similar to the provisions of their legislation, refund would be limited to prepayments made by a consumer through layaway sale arrangements.

The refund period currently provided in Section 20 of the Consumer Protection Act would be extended to operate for the one-week period, regardless of the existence of a "binding contract". The cancellation fee would be optional and limited to a certain percentage of the deposit (e.g. 15%) to cover the seller's costs in selling the item or service and arranging for the payment plan. The seller would also have the use of the consumer's payments, including any interest accrued, up to the time of cancellation. A necessary corollary of the right would include no obligation on the seller to begin delivery prior to expiration of the cancellation period. Therefore, there would be a need for an exclusion concerning custom-made or altered goods.

3) It is also recommended that the Consumer Protection Code

include a provision related to the requirement for a disclosure agreement with respect to refund of partial prepayments.

Several U.S. states have consumer protection legislation regarding either prepayments or layaways on retail goods. Such legislation requires disclosure of the basic terms and conditions involved in any consumer prepaid contract involving retail goods.

The following proposal would ensure that both the seller and the consumer are equally informed of the essential terms and conditions for sales involving deposits and layaways:

Require all sellers of consumer goods and services who take deposits or prepayments prior to delivery or performance (including layaways) to execute a written agreement with the purchaser at the time of acceptance of the deposit or prepayment in which the follwing information is clearly and conspicuously included:

i) The purchaser's right to cancel and receive a refund of all deposits paid within one week;*

ii) The seller's right to retain a limited and specified cancellation fee;*

iii) The seller's right not to commence delivery within the cancellation period;*

iv) Amount of prepayment;

v) Total purchase price;

vi) Balance owing, including payment schedule;

vii) Estimated delivery/performance date, including specific consequences where not met;

viii) Description of specific goods/services to be supplied;

ix) Whether any amounts paid (post-cancellation period for layaway sales) are refundable and, if so, under what conditions;

x) Any additional costs for which the consumer may be liable.

*Limited to layaways on retail goods only.

23. Freedom of Information and Privacy of Information

FREEDOM OF INFORMATION AND PRIVACY OF INFORMATION

BACKGROUND

Bill 34, An Act to Provide for Freedom of Information and Protection of Personal Privacy, was introduced in the Ontario legislature as a government bill in 1985, and became effective on January 1, 1988. Its purposes are to provide the public with a right of access to government-held records and to protect the privacy of individuals with respect to personal information about themselves held by the government.

In view of the provisions of this new legislation, it was determined by the Legislative review team that part of the research should be directed toward analyzing the confidentiality provisions of statutes administered by the Business Practices Division, recommending whether or not the standard secrecy provisions should be included in the proposed foundation statute, and suggesting a proposed direction related to information sharing between Ministries.

GENERAL PROBLEM AREAS

1) The confidentiality provisions of the statutes under the Business Practices Division, of the Ministry and the oath of secrecy under the Public Service Act generally are interpreted as preventing civil servants in the Ministry from releasing much information with respect to Division records. This may be found to be inconsistent with the intent of Bill 34 - An Act to Provide for Freedom of Information and Protection of Personal Privacy.

2) The Ministry has consistently adopted a policy of secrecy with respect to records, such as complaint statistics, under its control, but this policy may require in light of the Government's commitment to greater openness.

3) There is no statutory authorization under Ministry legislation for the sharing of information between institutions. This legislative deficiency became a problem when financial institutions formed a separate ministry.

SPECIFIC ISSUES

1) Should the standard confidentiality provisions, as they currently exist, be included in the proposed Consumer Protection Code, or should Bill 34 be accepted as a complete code on access to information and privacy matters, with no secrecy provisions being included in the revised Business Practices Division's legislation?

2) Should complaint statistics be released to the public

without a formal request for access?

3) Should the current practice of sharing information between the Ministry of Consumer and Commercial Relations and other ministries be discontinued, or should the Ministry seek approval to revise its legislation to permit information-sharing between ministries?

PROPOSED DIRECTION

1) Bill 34 should be recognized as a complete code on access to information and privacy matters, and no secrecy provisions should be included in the revised consumer protection legislation.

Confidential information, such as personal and third-party information, will be protected from disclosure.

Non-sensitive government information will be available to the public.

2) Statistics (but no specific details) regarding complaints against corporations, partnership and sole proprietorships registered with the Business Practices Division should be relaesed to the public as a matter of policy.

3) The Ministry should seek approval to amend Section 14 of the Ministry of Consumer and Commercial Relations Act to require the disclosure of specific information by institutions such as the Ministry of Financial Institutions.

The empowering acts of the participating institutions would require amendment in a similar way.

24. Door-to-Door Sales

DOOR-TO-DOOR SALES

BACKGROUND

The present Consumer Protection Act has four basic provisions pertaining to door-to-door sellers:

1) Door-to-door sellers must be registered and must place bonds of $5,000 with the provincial authorities. Door-to-door sellers are defined to include any seller who solicits business off normal business premises. The actual definition reads as follows:

> "itinerant seller" means a seller whose business includes soliciting, negotiating or arranging for the signing by a buyer, at a place other than the seller's permanent place of business, of an executory contract for the sale of goods or services, whether personally or by his agent or employee (s.1(i)).

This provision is designed to eliminate "fly-by-nighters" who solicit contracts door-to-door, who obtain consumer deposits, and who then disappear without delivering any goods or performing any services. Such sellers are required to be registered so that consumers may locate them in the event the goods or services are not forthcoming.

2) Door-to-door contracts must contain certain prescribed information. This information is set out in the provision governing executory contracts (s.19).

3) Consumers are provided with a two-day "cooling-off" period during which they may cancel a door-to-door contract for any reason (s.21). This provision is designed to provide a consumer with "breathing space" in which to reconsider a contract which may have been signed under high pressure in the consumer's home.

4) A marketing practice known as "referral selling" is prohibited (s.37). Door-to-door sellers were known to offer "discounts" to consumers who assisted sellers in obtaining the names of potential customers. This practice was thought to encourage high pressure salesmanship since consumers were considered to be less careful in dealing with sellers when the sellers were "referred" to them by friends and relatives. Also, the practice was considered to be misleading since the "discount" never materialized for the consumer if his or her friends or relatives did not enter into contracts with the seller.

The problems which have arisen with respect to the above provisions of the Consumer Protection Act are outlined in the following section.

GENERAL PROBLEM AREAS

1) Vulnerability of Consumers

In the 1987 Consumer Opinion Survey, conducted by the Legislative Review Project, door-to-door sellers registered the highest rate of dissatisfaction, out of 32 types of sellers listed. In addition, consumer representatives on all six Regional Consumer Advisory Panels expressed dissatisfaction and concern about door-to-door sellers.

The concern expressed by many is that today's door-to-door sellers appear to be concentrating their sales efforts on the more vulnerable members of society. Fewer women are at home during the day compared with twenty years ago, resulting in the narrowing of the door-to-door market. Today, consumers who are more likely to be home during the day are the elderly, the disabled, and the unemployed. Panelists expressed the concern that the elderly, in particular, appeared to be more often targeted by door-to-door sellers.

In supporting the perception that vulnerable groups are more susceptible to certain unfair practices of some door-to-door sellers, the following statistics are of interest. In the 1987 Consumer Opinion Survey, the consumers who expressed the most dissatisfaction with door-to-door sellers were those earning $10,000 or less per year and who had high school education or less. In addition, a survey conducted by a Toronto legal aid clinic in 1985 revealed that close to one-third of the clients who had approached the clinic for legal advice concerning door-to-door sellers had little or no ability to write in English, and the average yearly income of these consumers was $9,300.

2) Lack of Sufficient Protection from Unfair Practices

There are many honest and reputable companies and salespeople in the door-to-door sales industry; but at the same time, there are some who engage in unfair and unethical practices, and the present act does not seem to be protecting consumers from them.

The following problems have arisen with respect to the present legislation covering the door-to-door sales industry:

a) Definition of a door-to-door seller

The definition of "itinerant seller" in the Consumer Protection Act is far too complicated for a number of reasons:

- It is not generally a familiar term to members of the public, and does not seem to imply a level of long-term business commitment which exists with reputable firms in the direct sales field;

- o It is too wide a definition to effectively enforce. (For instance, real estate agents who sell homes and merchants who sell goods at country fairs are potentially "itinerant sellers" who must be registered under the present act);

- o It is not in tune with modern marketing practices. (For example, consumer leases entered into in the consumer's home are not covered by the legislation);

- o It is not sufficiently flexible. (For instance, high pressure tactics can be used by sellers even on their own business premises. The selling of hearing aids to the elderly is a good example.)

b) Registration

Although itinerant sellers are all required to register with the Ministry, only 2,000 out of a potential 100,000 businesses are actually registered. This failure in the registration system is due to a lack of adequate sanctions for failure to register, in addition to a lack of sufficient resources in the Ministry to follow up on delinquencies.

Despite the fact that the Consumer Protection Act provides a maximum fine of $25,000, there is no minimum fine to provide courts with guidance as to appropriate penalties.

A number of other Canadian jurisdictions have legislation that states that unregistered direct sellers cannot force consumers to honour contracts. However, Ontario does not have such an effective sanction in the Consumer Protection Act.

c) Bonds

The bonding system in the act presents problems in the following areas:

i) Insufficient protection - The $5,000 minimum bond is widely regarded as insufficient to cover the losses of door-to-door consumers, particularly in the home improvements field. Other provinces require bonds ranging from $5,000 to $500,000, depending on the size or volume of the business.

ii) Difficulty in obtaining bonds - Many small businesses have difficulty in obtaining bonds from insurance companies, and are often faced with the obstacle of a requirement to be in business for at least one year before the bond will be approved.

iii) Inflexibility - Although bonds are intended to provide consumers with compensation, it is actually quite difficult for consumers to gain access to them. Other

than in the case of bankruptcy, bonds are accessible to consumers only when a court has rendered a judgement against the seller, either in criminal proceedings or in civil litigation. Also, in the case of a judgment, even for a small amount in favour of the consumer, regulators must forfeit the whole bond and deregister the seller in order to give the consumer any money from the bond. This "all or nothing" approach inhibits regulators from pursuing compensation for consumers through the forfeiture of bonds. Other jurisdictions, such as in the United States, take a more flexible approach, by permitting accessibility to a bond upon a decision of a court, an arbitrator, or a regulator. Their approach is to allow partial access to a bond in the event that the consumer's claim is for less than the whole bond amount, and to suspend the seller's license until the seller reimburses the amount taken from the bond.

iv) Delay in obtaining compensation - In Ontario, once a bond is forfeited, consumers must wait up to three years to recover any funds from the bond. Consumers must wait at least one year to obtain a court judgment against a seller; the Consumer Protection Act stipulates that a bond will not be forfeited until the consumer's court judgment has remained unsatisfied for 90 days; and there is a policy that the Treasurer of Ontario retains the bond for two years in case other consumers come forward with valid claims. On the other hand, in the United States, payouts are made from a bond as soon as the time period for appeal from a decision of a court, arbitrator, or a regulator has elapsed.

d) Cooling-off Period

The cooling-off period provided by the Consumer Protection Act, in which a consumer may cancel a door-to-door contract without penalty, is two days. This is regarded as insufficient by many interest groups that have contacted the review team, particularly groups representing the elderly.

The United Senior Citizens of Ontario presented a brief to the project in which the following recommendation was made:

> "The 'cooling-off' period during which the consumer has the right to cancel any sales agreement at no cost and with no penalty should be extended to one week's duration; this provides ample time for older people to seek the advice of younger relatives or others whom they may not be able to reach within the current shorter cooling-off period."

A cooling-off period of two days is likely insufficient time for consumers to find out their rights, to compose a written notice of cancellation, and to deliver it personally or by registered mail to the seller.

This view was expressed at the Regional Consumer Advisory Panels, in the Public Opinion Survey, and at the Minister's Advisory Committee. It was also addressed in the brief submitted to the project by the Consumers' Association of Canada (Ontario).

The cooling-off periods of the other provinces in Canada are all more extensive:

Newfoundland	-	10 days
Saskatchewan	-	"
Nova Scotia	-	"
Quebec	-	"
P.E.I.	-	7 days
B.C.	-	"
New Brunswick	-	5 days
Alberta	-	4 days
Manitoba	-	"

e) Disclosure in Contracts

The disclosure rules with respect to direct sales are presently found under the "executory contract" section of the Consumer Protection Code. In the proposed Consumer Protection Code, these rules should be set out in the section dealing with direct sellers.

In addition, the rules should be strengthened, so that the consumer can be provided with information needed to locate the seller or cancel the transaction, if necessary.

f) Notice of Cancellation Rights

At present, there is no requirement in the act that sellers inform consumers of their right of cancellation.

A study conducted by a Toronto legal clinic in 1985 indicated that, out of forty consumers who had approached the clinic for assistance in disputes concerning door-to-door sales, only one consumer had properly exercised the right of rescission under the Consumer Protection Act, and only after having been informed of these rights by the clinic.

Many sales presentations are conducted in a language other than English. Federal legislation in the United States requires sellers who conduct sales presentation in a language other than English to use contracts which are written in that other language, whereas there is no such requirement under Ontario legislation.

It has recently been estimated that, in Toronto, 500,000 persons can neither read nor write, and that one out of four Ontarians is functionally illiterate (functional illiteracy is defined as the inability to use basic printed and written information to function in society). In addition, the study

conducted by Parkdale Community Legal Services indicated that close to one-third of its clients who were having problems with door-to-door sales had little or no ability to read and write English. In the United States, sellers are required to inform consumers orally of their right of cancellation at the time they sign the contract, to ensure that illiterate consumers are aware of their rights. No such provision exists at this time in Ontario.

g) Method of Cancellation

Consumers are presently required under the act to exercise their right of cancellation by composing a written notice of rescission, and hand-delivering it to the seller or posting it by registered mail. These, however, are onerous requirements for consumers who do not write well, or who do not have ready access to the seller or to a post office because of distance or because of physical disability.

Quebec and Alberta provide that notification for cancellation of a direct sales contract may be sent by regular mail, as does the Ontario Prepaid Services Bill, re-introduced in November 1987. In addition, under the Ontario Sale of Goods Act, which governs transactions between businesses, a phone call to cancel a contract is sufficient. Direct sales legislation in Illinois, Massachusetts, and Arizona, allows consumers to exercise their cancellation rights "by notifying the seller", which would include making a telephone call.

h) Cancellation Rights

Under the Consumer Protection Act, consumers who exercise their cancellation rights must immediately return the goods received under the contract, bearing the expense of the return themselves.

This provision creates hardship for low-income consumers. Although the act states that the costs are recoverable from the seller, reimbursement often does not occur, leaving the consumer with the only alternative of legal action to recover the costs. Due to the high expense of taking legal action to recover relatively low amounts, this section is hardly ever used by consumers.

Unlike Ontario, legislation in the United States, England, and Australia places the onus for costs directly on the seller by requiring the seller to retrieve the goods from the consumer's residence, in the event that a contract is cancelled within the cooling-off period.

SPECIFIC ISSUES

1) Who should be covered by the revised legislation regarding to door-to-door sellers?

2) How should the Ministry registration system be improved to ensure that the thousands of businesses who are presently not registered will do so under the new legislation?

3) In what manner can the present bonding system be improved to ensure that consumers have access to justice on a more timely and effective basis?

4) How can the cooling-off period be improved (i.e. to what period of time should it be extended?), and what exemptions should be provided with respect to the cooling-off period?

Should consideration be given to exempting contracts entered into as a result of bona fide emergencies? Otherwise, painters, for example, would not perform any services until the extended cooling-off period had expired.

5) Can the disclosure provision in the door-to-door sales legislation be strengthened?

6) In what way can there be some assurance that the consumer receives an understandable notice of cancellation rights?

7) How can the method of cancellation be made easier and, therefore, more likely to be used?

8) What particular cancellation rights should be included in the new Consumer Protection Code in order to facilitate the return of goods, and spread the cost of return more equitably?

PROPOSED DIRECTION

Definition of a Door-to-Door Seller

1) The proposed Consumer Protection Code should refer to door-to-door sellers as "direct sellers", similar to a number of other jurisdictions;

2) The definition of "direct seller" should be written in plain language;

3) The authority should exist to exempt certain types of sellers from the registration requirements of the act (e.g. sellers already licensed under other provincial legislation, charitable organizations, etc.).

Registration

4) Contracts entered into by unregistered sellers should be unenforceable against consumers;

5) The revised legislation should establish minimum fines for violation of the registration provisions;

6) Unregistered sellers should be prohibited from engaging in any advertising, including listing their names in telephone or business directories.

Bonds

7) All direct sellers should continue to be required to post bonds with the Ministry, but the size of the bonds should be increased dependent upon the number of salespersons employed by the seller;

8) Discussions should be entered into with the direct sellers' industry and with the insurance industry to determine ways of improving upon the flexibility of the present bonding system. For example, it is recommended that a government administrator have the authority to order a partial payout from a bond in order to compensate a consumer whose deposit has been wrongfully retained by the seller.

Cooling-off Period

9) The cooling-off period should be extended from two days to one week from the time the consumer receives a copy of the contract. Using the term, "week", instead of "days", will avoid the problem of determining whether or not to count retail business holidays, religious holidays, Saturdays, Sundays, etc;

10) In the event that the goods are not delivered or services are not substantially completed within 30 days of the estimated delivery or performance date, the consumer may cancel the contract at any time up to acceptance of delivery of the goods or up to substantial commencement of the services;

11) The cooling-off period should not apply in the event that the contract is for under $50 and, at the time of entering into the contract, all the goods are delivered or all the services are performed and payment in full is made;

12) The cooling-off period should not apply in the event that the consumer initiated the contract and the goods or services are to be delivered or performed in the course of a bona fide emergency.

Disclosure in Contracts

13) Direct sales contracts regulated under the proposed Consumer Protection Code must be in writing, and must contain the following information:

- the name, address, telephone number, and registration number of the seller;
- the date of the transaction;
- the estimated date of delivery of goods or of performance of services;
- a statement of the consumer's cancellation rights conspicuously placed below the space reserved for the consumer's signature;

14) A copy of the contract must be left with the consumer at the time of signing of the contract.

Notice of Cancellation Rights

15) Direct sellers should be required to attach to consumer contracts a Notice of Cancellation Rights, in a form prescribed by legislation;

16) In the case of a sales presentation being conducted in a language other than English, the Notice of Cancellation Rights should be written in that other language;

17) Sellers should be required to inform consumers orally of their right of cancellation at the time of entering into the contract.

Method of Cancellation

18) Consumers should be allowed to exercise their cancellation rights by notifying the seller within the cooling-off period, by returning to the seller within the cooling-off period any goods delivered to the consumer under the contract, or by refusing the delivery of any goods or the performance of any services;

19) The Notice of Cancellation Rights should include a cancellation form which the consumer may, but is not obligated to, use to notify the seller in writing of the cancellation of the contract;

20) If the consumer informs the seller orally of the cancellation, the consumer must confirm such cancellation by sending a written notice to the seller within one week of the oral cancellation;

21) Written notice should be allowed to be delivered to the

seller by any means (e.g. personal delivery, registered mail, regular mail), and, if delivered by mail, the notice should be deemed to be given at the time of mailing.

Seller's Obligations

22) Upon cancellation of a direct sales contract within the cooling-off period, the seller should be required to retrieve the goods from the consumer at the consumer's residence.

23) Upon cancellation of a direct sales contract within the cooling-off period, the seller should be required, without deduction and within fourteen days of the cancellation, to:

- refund to the consumer all money paid by the consumer under the contract;
- return to the consumer, in substantially as good a condition as at the time of the sale, all goods received from the consumer or money in lieu of the goods;
- if the seller's services result in the alteration of the property of the consumer, restore the property to substantially as good a condition as it was immediately before the services were rendered, at the request of the consumer.

Consumer Remedies

24) A consumer who cancels a contract should be entitled to retain possession of any goods or materials received under the contract until the seller has fulfilled the obligations under recommendation 23.

25) A consumer who retains possession of a seller's goods or materials under a consumer's lien should be required to take reasonable care of them, but otherwise thay are at the risk of the seller.

26) Where the seller does not fulfill his obligations within 60 days of receiving a written notice of cancellation, the title to such goods or materials passes onto the consumer.

27) Where a consumer successfully sues a seller for the seller's failure to comply with its obligations under recommendation 23, the court should be required to award to the consumer three times the consumer's actual damages or $300, whichever is greater, plus court costs and lawyer's fees.

25. Mail Order Sales

MAIL ORDER SALES

BACKGROUND

Mail order selling is an industry that has existed for many years, but which has recently been growing at an accelerating rate. Between 1975 and 1985, the volume of mail order sales in Canada increased from $205 million to $624 million.

The mass communication methodologies of the technological age have resulted in an increasing number of consumers who purchase goods through the mail.

However, the expanded use of mail order sales has been accompanied by increasing numbers of consumer complaints.

GENERAL PROBLEM AREAS

1) Significant Number of Complaints

a) Ontario Ministry of Consumer and Commercial Relations

The Legislative Review Project conducted a review of 1,218 complaint files at the Ontario Ministry of Consumer and Commercial Relations for 1986. These files represent approximately 10% of the 12,000 complaints which the Ministry receives every year.

The review team found that complaints about mail order companies constituted the third largest source of complaints, following complaints about home repairs and automobile repairs. Of the 1,218 complaint files reviewed, 122 concerned mail order sales (10%), 126 concerned automobile repairs (10.3%) and 176 concerned home repairs (14.5%). Based on this review, it is estimated that the Ontario Ministry of Consumer and Commercial Relations may receive approximately 1,200 consumer complaints per year concerning mail order transactions.

b) Star Probe

Although this action-line column in the Toronto Star does not keep statistics of its complaints, a review of its columns would indicate that complaints about mail order sales are numerous. There are at least five letters a week that are published in the column regarding mail order sales.

c) Canadian Direct Mail Marketing Association

According to a CDMMA official, this organization receives approximately 50 complaints per month concerning mail order firms. In 1985, the CDMMA handled 725 complaints regarding mail order sales, of which 127 were not resolved.

d) Better Business Bureau

"Mail Order Companies" top the list of the "Top 10 Leaders" against whom complaints were lodged with the Canadian Council of Better Business Bureaus in 1985 (the most recent year for statistics). Together with "Magazines Ordered by Mail" (ranked fifth), mail order complaints accounted for 12% of all complaints brought to the Better Business Bureau (2,341 out of 19,520).

e) Other Provinces

Both Quebec and Manitoba report that complaints about mail orders make up a significant portion of total complaints. In 1983, mail orders constituted the third largest source of complaints in Manitoba (177 out of 2,773 complaints). Although Quebec does not keep statistics, an official from the Quebec L'Office de la Protection du Consummateur states that his office receives several hundred complaints per year related to mail order sales. An official from Consumer and Corporate Affairs, Montreal Regional Office, states that 10 to 15% of his office's complaints concern Quebec mail order companies which operate across Canada.

2) Types of Complaints

The types of mail-order complaints may be generally categorized as follows:

a) Non-delivery or late delivery of goods

The greatest portion of complaints involve the non-delivery or late delivery of goods ordered and previously paid for by the consumer. Although most mail order houses provide delivery within six to eight weeks, many complainants have not received their goods after waiting for as many as six or eight months.

Mail order sellers attribute the delay or non-delivery to poor postal service, customers' changes of address, or unexpectedly high customer demands requiring the replenishing of stocks.

Sometimes, mediation by third party complaint handlers results in delivery, but in many instances, such attempts fail.

b) Incorrect delivery of goods

Consumers complain about receiving substitute goods without their consent, about receiving too few (or too many) goods, and about receiving goods (e.g. monthly magazines) on an irregular or erratic basis. Consumers complain that repeat complaints to the sellers do not rectify the problem.

c) Billing practices

Consumers complain about being billed for goods which they never received, or for being billed for goods which they returned pursuant to a "full money refund" policy. Despite repeated objections to the sellers, consumers report that threatening collection letters continue to be sent to them. Some consumers eventually pay the money requested of them in order to put an end to the letters and to avoid negative effects on their credit ratings.

It is the general feeling among complaint handlers that a large number of these complaints result from the poor record-keeping practices of some mail order houses.

d) Refund practices

As previously outlined, there are problems associated with the refund practices of some mail order firms.

Many firms have a "full money refund" policy, in the event that a customer is not satisfied with the quality of goods purchased. However, sometimes refunds are not made or are only made after requiring an inordinate amount of effort on behalf of the consumer. For example, some mail order firms will not provide a refund unless the consumer provides his or her original account number, or copies of both sides of his or her cancelled cheque, or both. Other firms will provide the refund only after an inordinate delay (e.g. six to eight months). Many consumers complain that when they finally receive the refund, charges for postage and handling have been deducted and retained by the company. (In the case of small orders, such charges can amount to 50% or more of the refund).

e) Failure to answer customer enquiries

Many consumers complain that their enquiries to mail order houses regarding ordered goods, incorrect billing, etc., are not answered in spite of numerous attempts.

f) Negative Option Plans

Consumers have complained about the use by mail order companies of negative option plans to sell their goods.

Mail order companies which use such plans are usually book, record, magazine and cassette "clubs". Consumers agree to receive goods automatically, usually monthly, unless specifically instructing the company otherwise. Cable television stations and telephone companies also use negative option plans in the promotion of their services.

Consumers of cable television and telephone services object to being billed for services which they never ordered.

Customers of mail order companies who agree to become members of "clubs" complain about misunderstanding essential terms of the membership agreement.

g) Defective goods

Consumers complain that goods, once received, are defective, of poor quality, or are not as represented in the fliers or catalogues.

h) Misleading advertising

Consumers complain that promises of "grand prizes" in the amounts of $25,000 to $10 million are exaggerated and misleading; that "free gifts" represented as large brightly wrapped boxes in catalogues are actually small and inexpensive (e.g. a box of toothpicks, a plastic key chain); that "real diamonds" are actually rejected roughcuts of little value.

i) "Bonded under the Consumer Protection Act"

One mail order firm based in Montreal and bonded under the Quebec Consumer Protection Act distributes English-language pamphlets in Ontario stating that it is "Bonded under the Consumer Protection Act." Consumers assume that the Act referred to is Ontario's, when in fact, this province's act does not require the bonding of mail order companies. Consumers have asked the Ministry of Consumer and Commercial Relations to revoke the "bond" because of the type of practices engaged in by the company as previously outlined. Alternatively, the Ministry has been asked by Ontario consumers how a company can be bonded when it is known to be the source of so many consumer complaints.

j) Invasion of Privacy

Many people do not like receiving unsolicited mail or telephone calls and consider it an invasion of privacy of one's home. Some people are also concerned about the privacy implications in the sale and rental of mailing lists.

3) Consumer Opinion Survey

The 1987 Consumer Opinion Survey, undertaken as part of the Legislative Review Project, asked participants to rate the quality of services provided by a number of types of organizations and sales representatives promoting products and services, including mail order sellers. This survey indicated that out of 32 types listed, mail order sellers were rated the 3rd worst, after door-to-door and telephone sellers.

4) Limited Jurisdiction of Provincial Legislation

A significant problem arises in the mail order industry when less scrupulous businesses operate from one province and sell to customers in another province.

Provincial enforcement authorities do not have the jurisdiction to lay charges against people residing outside the province, to require their attendance at court, or to execute judgments by the seizure and sale of property, if the person or company subject to the judgment has no assets within the jurisdiction. These problems do not exist, however, in matters of federal jurisdiction.

As a result of the limited jurisdiction of provincial legislation, and because of the lack of federal legislation, mail order sellers in Canada are virtually unregulated.

SPECIFIC ISSUES

1) Should Ontario deal with mail order complaints by encouraging the federal government to enact mail order legislation, or by attempting to improve the coordination of inter-provincial enforcement efforts?

2) Would the Ontario Business Practices Act be adequate for use in attempting to solve problems relating to mail order sellers?

3) Would treatment of mail order sellers as "itinerant" merchants under the Consumer Protection Act provide a satisfactory measure of regulatory control over mail order sellers?

4) Should specific legislation be introduced in Ontario, similar to that in Quebec and Alberta, requiring the bonding and registration of mail order sellers carrying on business activities in Ontario?

5) Should specific mail order legislation be introduced in Ontario, prescribing standards of conduct, similar to American legislation and to the code of ethics developed by the Canadian Direct Mail Marketing Association?

6) Should comprehensive mail order legislation, requiring bonding and registration of mail order sellers, prescribing standards of conduct, and also providing enhanced remedies to consumers, be introduced into the new Consumer Protection Code?

PROPOSED DIRECTION

The Ministry of Consumer and Commercial Relations raised the problem of mail order complaints at the Federal-Provincial-Territorial Conference of Ministers in June, 1987.

It was emphasized, at this meeting, that the provinces and the federal government need to work together in order to cooperatively resolve areas of common complaints in the mail order industry.

The Legislative Review Project recommends that these cooperative efforts continue, but also recommends that some form of legislative protection for consumers is necessary, in view of the extent of complaints and dissatisfaction with respect to mail order sellers.

The existing Consumer Protection Act and the Business Practices Act do not appear to provide sufficient coverage to protect consumers from unfair practices in the mail order area.

Consequently, it is proposed that comprehensive mail order legislation be considered by the Ministry of Consumer and Commercial Relations.

The components of such comprehensive legislation, possibly to be included in the proposed Consumer Protection Code, could be as follows:

Application of Legislation

1) The legislation would apply to mail order sellers located or carrying on business in Ontario;

2) Mail order goods and services would be defined to include goods and services ordered through the mail or over the telephone. Therefore, consumers who order goods or services over the telephone during a television promotion would be protected.

Delivering goods on time

3) It would be a requirement that goods be delivered to the consumer within the time frame stipulated in the promotional materials or offer. If no time is stipulated, it would be necessary to deliver within 30 days of receipt of the order;

4) If delivery within the time frame is not possible, a notice would be required to be sent to the consumer before the expiry of the time frame. The notice would:

- o advise the consumer of the delay and of the revised delivery date;
- o give the consumer a choice of consenting to the delay or of requesting a refund;
- o advise the consumer that if he or she does not respond to the notice, the seller may presume that he or she consented to the delay;
- o advise the consumer that if the goods are not delivered within the revised delivery date, he or she may cancel the order at any time and the seller must provide the consumer with a refund;

5) The notice would be accompanied by a self-addressed and stamped post card or a toll-free telephone number to assist the consumer in exercising his or her choice.

Refunds

6) Where a consumer exercises his or her right to cancel an order and to receive a refund, it would be a requirement to send the refund to the consumer within seven days of receipt of the request;

7) A refund would include all monies paid to the seller by the consumer, including charges for postage, shipping and handling, unless the seller conspicuously states otherwise in promotional materials;

8) A seller would not be required to impose unreasonable proof of purchase requirements on consumers requesting refunds.

Incorrect delivery of goods

9) No substitution for goods would be permitted without the consumer's consent. If substituted goods were delivered, or if too many goods were delivered, they could be returned to the seller at the seller's expense;

10) Repeated delivery errors and delays in a long-term contract could give rise to a consumer's right to cancel the contract and to receive a refund equal to the value of the goods not yet delivered, including handling and other charges.

Billing practices and record keeping

11) Sellers would be required to keep accurate records of customer accounts at all times;

12) Corrections of errors would be required within one week of the seller being notified of them;

13) Persistent billing errors could give rise:

- in a long-term contract, to cancellation of the contract by the consumer and to a refund equal to the value of the goods not yet delivered including handling and other charges; and
- in any mail order contract, to a claim by the consumer for damages.

Identity of seller

14) It would be necessary for every mail order seller, in its written materials, to conspicuously identify itself with reference to:

- the Ministry registration number;
- the legal name of the company;
- the street address and telephone number;
- if the seller is a division of another organization, the name of that organization.

Unsolicited goods or services

15) No consumer would be liable for any goods or services provided to the consumer which the consumer did not specifically request;

A request may not be inferred from inaction or the passing of time alone.

Negative Option Plans

16) The previous provision would not apply where the consumer has requested the seller, in writing, to furnish the consumer with goods or services periodically, without further consent from the consumer (negative option plan) and where the consumer, prior to entering into such a plan, was furnished with the following information in writing:

- a description of the goods or services;
- the full cost to the consumer;
- the fact that notices will be sent to the consumer

regularly from which the consumer may make a selection;

- o the consumer's right to consider any offer of goods or services contained in the notice for 30 days, and the statement that if any goods or services are provided to the consumer during that period, the consumer will not be liable for them;

- o the minimum quantity of goods or services which the consumer must purchase under the contract or, alternatively, the duration of the agreement;

- o the fact that if the consumer does not respond to the notice, the seller may provide the goods or services at the seller's discretion and the consumer will be liable for them;

- o the consumer's right to cancel the contract once the consumer has purchased the minimum number of goods or services;

- o the frequency and the maximum number of notices that the consumer will receive in a twelve-month period.

17) In the absence of agreement to the contrary, a consumer would not be liable for goods or services provided as part of a negative option plan unless, 30 days prior to goods or services being provided to the consumer, the seller delivered to the consumer a notice in the form of a postcard, pre-addressed to the seller, and containing the following information:

- o the fact that the consumer had 30 days in which to consider the offer for goods and services, and that a statement should the goods or services be provided to the consumer during that time, the consumer would not be liable for them;

- o the fact that if the consumer did not respond to the notice, the seller could provide the goods or services at the seller's discretion, and the consumer would be liable for them;

- o the fact that the consumer could use the postcard to inform the seller that the consumer did not wish to receive the goods or services offered.

Registration

18) No person would be allowed to carry on business in Ontario as a mail order seller without being registered with the provincial authorities;

19) A seller could register and carry on business as a mail

order seller only under one name.

20) One condition of registration would be that the seller post a bond with the provincial authorities.

21) Consumers would have access to the bond upon obtaining a successful court judgement against the seller;

22) Consequences of failure to register with the provincial authorities would include the following:

- all contracts with Ontario consumers would be unenforceable and any action to collect payment under such contracts would be prohibited;

- the director could publicize the fact of the non-registration to members of the public.

Consumer Remedies

Reference should be made to the "Consumer Remedies" paper. It deals with minimum fines, damages, and substitute actions, to be included in the new Consumer Protection Code.

A provision for the court, at its discretion, to award a certain level of minimum damages to the consumer (e.g. $200), upon the decision of a court case in favour of the consumer, would likely provide an effective deterrent to any possible unfair practices by mail order sellers.

26. Telephone Solicitations

TELEPHONE SOLICITATIONS

BACKGROUND

One of the most frequent concerns expressed by panelists during the course of the six Regional Consumer Advisory Panels, was with respect to telephone solicitations. In essence, telephone solicitations were regarded as a "nuisance" concern. In all six regions, panel members were angered by the persistence of these calls, especially those which were computerized or electronic. Consumers basically regard telephone solicitations as an invasion of their privacy.

In the 1987 Consumer Opinion Survey, a series of questions asked for responses to issues related to telephone, mail order and door-to-door sellers. Consistent with the 1983 Ministry survey results, these three sales approaches were ranked as providing the poorest quality of service. Out of the 1987 sample population, 29% found the quality of service for door-to-door sellers to be poor, 26% rated the quality of service of mail order sellers as poor, and 32% rated telephone selling service as poor.

From the 1987 survey sample, it was noted that 48% indicated that their households received one to three unsolicited telephone calls a month. Approximately 20% indicated that they received four to six a calls per month, and 10% received seven to ten calls a month. Over 11% received more than 10, and only 7% received no unsolicited calls. Approximately 79% stated that they would appreciate receiving fewer calls, 16% advised that no change in the number of calls they receive would be suitable, but only about 1% felt that they would like more calls per month.

These statistics indicate that telephone solicitations are annoying to consumers, with the result that appropriate government intervention to control or reduce these calls would likely be well-received by the public.

GENERAL PROBLEM AREAS

1) Telephone solicitors sometimes fail to disclose their identity and the nature of the call.

2) Automatic dialing and announcing devices, which are sometimes used, do not disconnect from the line when the consumer hangs up.

3) The telephone solicitor persists in telephoning a consumer, despite the consumer's expressed desire not to do business with the seller.

4) The consumer does not wish to receive any solicitations by telephone or wishes to limit the times at which telephone solicitations may be made.

5) Telephone solicitors ask for the consumer's credit card and occasionally charge the consumer for products or services that the consumer did not agree to purchase.

6) Telephone solicitors do not always deliver goods or services ordered.

SPECIFIC ISSUES

1) Can some recognition and protection be given to the consumer's perceived right to privacy?

2) Should special disclosure requirements apply to telephone solicitors?

3) Should telephone solicitors be subject to a registration or licensing system?

PROPOSED DIRECTION

1) A person soliciting by telephone should be subject to the same regulation as are other sellers who solicit at places other than their permanent place of business.

2) A person soliciting by telephone should be required to disclose the name of the seller and the nature of the call within the first 30 seconds of the conversation.

3) The Ministry of Consumer and Commercial Relations should enter into discussions with the industry, the telephone utility, and the Canadian Radio-Television and Telecommunications Commission for the purpose of setting up a listing of telephone numbers of those who do not wish to receive telephone solicitations.

4) Any telephone solicitor who telephones a consumer after that consumer has indicated that he or she does not wish to receive calls from that solicitor or the business on behalf of which that solicitor is acting, should be deemed to be engaging in an unfair trade practice.

27. Charitable Solicitations

CHARITABLE SOLICITATIONS

BACKGROUND

Over the years, the Ministry of Consumer and Commercial Relations has received numerous complaints related to charitable solicitations, some of which were subsequently determined by investigators to be "scams" and not charitable, as advertised. Most of these complaints come from in larger cities, where door-to-door and telephone solicitations, whether related to charitable giving or some other service or product sale, occur more frequently in more populated communities.

GENERAL PROBLEM AREAS

1) The status of the organization for which the donation is being solicited is not disclosed in some instances (e.g. a for-profit, as opposed to a non-profit organization).

2) The donations are occasionally not used for the purpose for which they were solicited and given.

3) The amount of money actually spent on the charitable purpose is sometimes extremely small, in relation to the total amount collected by the organization.

4) Potential donors, particularly vulnerable people, may be subject to high pressure and harassment.

5) Insufficient information is given at the time of the solicitation regarding the uses to which the donation will be put.

6) A name may be used by a solicitor, which is so similar to the name of an existing, legitimate charity, that there is confusion between the two organizations. As a result, donations are made under a misunderstanding of the identity or purpose of the solicitor/donee, and the reputation of the legitimate charity is negatively affected.

7) In some situations, no receipt is given for the donation.

SPECIFIC ISSUES

The area of charitable solicitations has been a source of difficulty for the Ministry of Consumer and Commercial Relations due to the fact that it does not easily fit into the usual area of consumer protection. This is particularly the case with respect to solicitations which are limited to the collection of donations without the sale of goods or services to the persons solicited. Some of the

specific issues which should be dealt with include:

1) Who is the consumer in the case of a charitable solicitation - is it the donor or is it the person for whose benefit the funds are to be expended?

2) Should there be a legislative requirement that specified information be disclosed to the potential donor at the time of solicitation?

3) How can the consumer be assured that the donation goes to the charity?

4) Should third-party fundraisers (those hired sepcifically to solicit charitable donations) be registered and bonded by the Ministry?

PROPOSED DIRECTION

1) A charitable solicitation should be deemed to be a consumer transaction in order to bring it within the terms of the Consumer Protection Code, especially those provisions prohibiting unfair practices.

2) A donor should be deemed to be a consumer in order that he or she may invoke civil remedies against the charity.

3) A charitable solicitation made by a solicitor, authorized by a charity to act on its behalf, should be deemed to be a charitable solicitation by that charity, thereby making charities liable for the acts and practices of their agents.

4) The following information should be disclosed to potential donors at the time of the charitable solicitation:

a) the name and address of the charity;

b) whether the charity is a for-profit or non-profit organization;

c) whether the charity is a registered charity (as defined by) the Income Tax Act;

d) the minimum percentage of the donation which is to be used for the charitable purpose for which the funds are collected; and

e) the uses to which the funds collected will be put.

5) Failure to provide the information required to be disclosed should give the donor the right to cancel the donation.

6) All donations received by third-party fundraisers should be paid into a bank account controlled by the charity.

7) The Ministry of Consumer and Commercial Relations should enter into discussions with the Ministry of the Attorney General and the Office of the Public Trustee regarding the possible regulation of third-party fundraisers.